FAIRNESS IN CLASS ACTION SETTLEMENTS

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ABSTRACT

To be made effective, class action settlements must be negotiated fairly, be perceived as fair and reasonable by the settlement parties such that they agree to their terms and substance, and be characterized as fair, reasonable and adequate by a court at the occasion of a settlement approval hearing. But how is settlement fairness defined, in a collective litigation context? By which process is the evaluation of fairness made and the approval given by the court? What role does the court correspondingly have, in that context?

This thesis explores the legal policy and reasoning behind the mandatory judicial approval of class settlements, the process by which it is sought and obtained, the currently relevant factors and indicia of settlement fairness which support all decisions to approve, and the roles of the principal settlement actors, particularly the settlement judge. It suggests hypotheses for reform applicable to these approval processes, roles of the actors and standard of settlement fairness. These hypotheses are tested, for their plausibility, against empirical data obtained from the qualitative interviews of seventeen judges conducted by the author in four target jurisdictions that have similar approaches to class action settlement approvals, and where class action litigation activity is heavy: Quebec, Ontario, British Columbia, and the United States federal courts. Ultimately, the thesis proposes final recommendations for reform of the class action settlement approval procedure.

RÉSUMÉ

Toute transaction hors cour en matière de recours collectif doit être négociée équitablement, être perçue comme étant juste et équitable par les parties afin qu'elles puissent consentir à son contenu, et être évaluée comme telle à l'occasion d'une homologation par un juge donnée lors d'une audience sur le caractère équitable de la transaction. Comment ce caractère juste et équitable de la transaction peut-il être proprement évalué dans un contexte collectif? Quel processus et quelle procédure le juge doit-il suivre dans l'évaluation du caractère juste et équitable? Quel rôle le juge doit-il avoir, dans ce contexte bien précis?

Cette thèse explore les raisons sous-jacentes à l'approbation judiciaire des transactions de recours collectif, le processus par lequel de telles transactions sont soumises par les parties pour évaluation et approbation, ainsi que celui par lequel le juge évalue et décide ou non d'approuver la transaction. Les critères d'équité et de raisonnabilité d'une transaction projetée sont également discutés, tout comme le rôle des principaux acteurs impliqués dans le règlement, incluant principalement celui du juge évaluateur et approbateur. La thèse suggère des hypothèses de réforme relatives au processus d'évaluation et d'approbation, aux rôles des acteurs judiciaires et au standard d'équité et de raisonnabilité transactionnelle. Ces hypothèses sont ensuite testées, pour leur plausibilité, par rapport aux données obtenues dans le cadre de dix-sept entrevues de juges, effectuées par l'auteure, juges agissant dans quatre juridictions principales dans

lesquelles les pourcentages de recours collectifs intentés demeurent les plus élevés : Québec, l'Ontario, la Colombie-Britannique et les cours fédérales américaines. Enfin, des recommandations définitives de réforme sont proposées dans le but d'améliorer le fonctionnement du système d'approbation des transactions collectives, ainsi que l'équité et la raisonnabilité des processus, procédures et résultats dans ce contexte.

ACKNOWLEDGEMENTS

This thesis project was born out of a courtroom experience; the experience of sitting in a fairness hearing at the Montreal courthouse, listening to oral representations made by counsel regarding a proposed settlement's fairness and reasonableness, and believing that the procedure followed to make such settlements effective has important lacunas that must be addressed.

One full year passed, and I was admitted at McGill's Doctorate program. A few months later, the project was officially launched. In November 2007, I met with my supervisor, Professor and now Dean of Law Daniel Jutras, for the first time. I explained how enthusiastic I was about pretty much every issue closely or largely related to class actions. He listened, smiled, then quietly attempted to canalize my enthusiasm by asking me which theoretical perspective I wanted to address in the thesis, and whether I ultimately wished to present an internal or external perspective to class action law. I was not sure, back then, what he meant by these questions. I told him that I wanted to write to reform the law. He suggested that a good way to address most of my interests relative to class action law and to propose law reform was to concentrate on class action settlements. I thought it was a brilliant idea.

I am of course grateful for this suggestion, which lead to a thesis about that very topic, but more importantly, I will be eternally grateful for his constant support over the years, for his tremendous intellectual investment, and for his rigorous, original and insightful advice for the complete duration of this most challenging project. I am also grateful for his friendship, his mentoring. *Merci beaucoup, beaucoup Daniel*.

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My parents, Marie and Jacques, raised me thinking that I should never back down, and that I should only seek to give the best of myself in any project. This is it; I have given the best of myself. *Maman, papa, merci pour votre support indéfectible et pour m'avoir appris à persévérer*. Thanks to my sister, Geneviève, already a doctor in psychology and professor, who was a great inspiration to me and whom I wholly admire. Thanks to Guillaume, my brother, who supported me in ways unimaginable through his smiles, energy, and positiveness. I love you, *Guillaumou*!

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While this thesis is not a manuscript-based thesis, I acknowledge that portions of the following four background articles, published in law reviews in the last two years, have either been reproduced in the thesis, or have strongly influenced its direction and contents. The law review articles are:

1. Piché, Catherine. "A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness" (2010) 41:1 Ottawa L. Rev. 1.
2. ---. "Judging Fairness in Class Action Settlements" (2010) 28 Windsor Y.B. Access Just. 111.
3. ---. "The Cultural Analysis of Class Action Law" (2009) 2 J. Civ. L. Stud. 101.
4. ---. "The Power of Class Actions" (2009) 2: 1 *Critical Issues in Justice and Politics 77.*

FAIRNESS IN CLASS ACTION SETTLEMENTS

> *[l]ife is itself a process, and by making process the center of our attention we are getting closer to the most enduring part of reality. For that reason […] the recommended emphasis on procedures for solving conflicts will not tend simply to suppress those conflicts, but will promote their just solution. If we do things the right way, we are likely to do the right thing.*[1]

INTRODUCTION

How can judges *do things the "right way"*, to quote Lon L. Fuller, in approving class action settlements, such that *the "right thing" is done*? In other words, what fair processes of negotiation, evaluation and approval of these settlements should be followed, to achieve fair outcomes in the out-of-court resolution of class action litigation?

To be made effective, the class action settlement must be negotiated fairly, be perceived as fair and reasonable such that the settlement parties agree to its terms and substance, and be characterized as fair, reasonable and adequate by the settlement judge at a settlement approval hearing. But how is settlement fairness defined, in a collective litigation context, and by which process is the fairness evaluation made and the approval given by the settlement judge? What role does the adjudicator judge correspondingly have, in that context?

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[1] Lon L. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. Legal Educ. 189, 204 (1948).

Let us imagine, for a moment, that following a two-week settlement conference, a settlement is reached that terminates several securities class actions.[2] Because all of the actions were case managed together by an Ontario judge, they are to be approved by another Ontario judge to be made effective. A proposed settlement agreement has been executed by counsel for the settling parties and filed with the court as a "Consent and Agreement". Its principal provisions are that:

1. The Ontario class proceedings will be certified as class proceedings on consent;
2. Some of the defendants and third parties paid the sum of approximately $85 million in full and final settlement of all claims;
3. Class members of the prospective class actions will receive a distribution from the assets of [the defendant company], estimated at approximately $35 million;
4. Class members in one of the class actions will be paid an amount of more than $7 million *pro rata* as a priority payment, based on their stronger statutory claim;
5. An administrator of the settlement will be appointed and will operate the plan of distribution and make decisions regarding eligibility to claim, as well as contact

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[2] The fact pattern described in this paragraph is heavily inspired/reproduces sections of the Ontario settlement of the YMB Magnex International Class Actions filed as *Mondor v. Fisherman; CC & L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2002), 22 C.P.C. (5th) 346 (Ont. S.C.J.), as appears from the notice of settlement, published online: http://www.pressreleasenetwork.com/pr-2002/may/mainpr1202.htm.

known members to explain how to submit a claim;

6. Class members will have a fixed date to opt out of the class actions;
7. Every class member will be bound by the settlement, whether or not he or she submitted a claim and whether or not it has been accepted;
8. Each class member who did not opt out will be deemed to have released all settling defendants and third parties of all claims of every nature or kind, and will be forever barred from asserting any such claims;
9. Each class member who did not opt out will have until a fixed date and time to submit a claim to participate in the distribution of monies;
10. The cost of the notices, administration and distribution will be paid out of the settlement monies;
11. The fees and disbursement of class counsel will be fixed and approved by the Court and paid out of the settlement monies; and

> 12. The Court will supervise the administration and operation of the plan and issue necessary related orders.[3]

Once approved by the Ontario judge, this settlement will automatically bind all class members who did not opt out from the class action, as provided in Article 7 of the agreement. It will also simultaneously annihilate each of these members' right to present his or her case at trial, and have his or her *day in court*, and accordingly, it will in essence "[threaten] perhaps the most central tenet of the civil justice system – that a court will not decide a person's dispute without giving her a chance to tell her side of the story".[4]

This elaborate class settlement agreement, nonetheless, is a typical example of what is today the most likely outcome of North American class action litigation: settlement.[5] Only a small fraction of all class actions

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[3] For a full copy of all documents relevant to this settlement. Online: http://ymbclassaction.com.

[4] Steven C. Yeazell, *From Medieval Group Litigation to the Modern Day Class Action* (New Haven, Conn.: Yale U. Press, 1987) ["Yeazell, Medieval Group Litigation"]. Also see Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard L. Rev. 353 at 372-73 ["Fuller, Forms"] ("The essence of the rule of law consists in being assured of your day in court. Courts can be counted on to make a reasoned disposition of controversies,[…] you cannot be fair in a moral and legal vacuum. […] adjudication cannot function without some standard of decision, either imposed by superior authority or willingly accepted by the disputants. Without such a standard the litigants' participation through reasoned argument loses its meaning.").

[5] It is very difficult to obtain statistics that are more than anecdotal in the field. For older sources, see Ward K. Branch & John C. Kleefeld, "Settling a Class Action (or How to Wrestle an Octopus)" in *Canadian Institute Conference on Litigating Toxic Torts and Other Mass Wrongs (*Toronto: Canadian Institute, 2000) at Tab XVI, 8-10; Willging et al., "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules", 1996, available at http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf, at 60 (where the authors found that the majority of certified class actions resulted in settlements. The percentage of certified class actions that ultimately settled ranged from 62% to 100%, while settlement rates for uncertified cases ranged from 20% to 30%.) ["Willging & al., Empirical Study"]. See also Janet Cooper Alexander, "Do the Merits Matter? A Study of

(certified or not) go to trial, a rate consistent with non-class litigation.[6] When a settlement does occur, and courts are required to approve it, there

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Settlements in Securities Class Actions" (1991) 43 Stan. L. Rev. 497 at 567; Sylvia R. Lazos, "Abuse in Plaintiff Class Action Settlements: The Need for a Guardian during Pretrial Settlement Negotiations" (1985) 84 Mich. L. Rev. 308 at 308. In Quebec, the Fonds d'aide aux recours collectifs publishes annual reports with statistics about class action activity: Fonds d'aide aux recours collectifs, Rapport annuel 2008-09, online: http://www.farc.justice.gouv.qc.ca/doc/RapportAnnuel2008-2009.pdf. In its latest report (the 2009-2010 Report, which was released prior to the thesis submission, does not include such information relative to the settlement numbers), the Fonds indicates that close to 30% of cases are settled or discontinued at the authorization stage (with 27% authorized, 20% rejected and 23% cases pending), while close to 33% are settled or discontinued at the trial (with 17% granted motions, 11% rejected, and 40% cases pending), see Report, *ibid* at pp. 16 and 18. These statistics are not entirely reliable for this thesis' purposes because they consider the number of cases still pending, as opposed to drawing conclusionary percentages from the number of cases resolved per year. For Quebec statistics, see Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice – Impact et évolution* (Cowansville: Yvon Blais, 2006) at 35 ["Lafond, Rôle du juge"] (« Les jugements finaux dans un recours collectif restent pourtant peu nombreux. La majorité des recours collectifs prennent fin par la conclusion d'une entente de règlement hors cour. […] plus de trois dénouements favorables sur quatre (85%) épousent la forme d'un règlement. »). On October 26, 2010, the internal statistics of the Class Action Chamber of the Montreal Superior Court indicate that in 2009, 30% of all class action cases that ended during that year were cases that settled, and 63% were cases that either settled or were discontinued. (Information obtained on October 26, 2010).

[6] Admin. Office of the U.S. Courts, 2007 Judicial Facts and Figures tbl. 4.10, available at http://www.uscourts.gov/judicialfactsfigures/2007/Table410.pdf, cited in Samuel Issacharoff & Robert H. Klonoff, " The Public Value of Settlement" (Nov. 2009) (Fordham Law Rev., forthcoming) (where the authors explain, at 124, that "between 2000 and 2007, only 1.3% to 4.1% of civil cases filed in federal district courts reached trial." And also that similarly in the class action context, "the overwhelming majority of actions certified to proceed on a class-wide basis… result in settlements."); Nicholas M. Pace, "Class Actions in the United States of America" (Dec. 2007), report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007, available at http://www.law.stanford.edu/display/images/dynamic/events_media/USA__National_Report.pdf at 91 ("Evidence suggests that the rate of trial may be lower than what might be seen in non-class litigation involving similar claims and defenses. Evidence also suggests that outcomes other than trial or settlement are involved in a larger fraction of class actions than in non-class litigation. In only those cases with certified class actions, class settlements are by far the most common result."); W.A. Bogart, Jasminka Kalajdzic and Ian Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (Dec. 2007), report also prepared in context of same conference, available at http://www.law.stanford.edu/library/globalclassaction/PDF/Canada_National_Report.pdf at 21 ("Few statistics are available on the number of cases that settle, either before or after certification or the common issues trial. Anecdotally, it appears that less than 5% of all class actions go to trial, a rate that is consistent with ordinary litigation. Over the last five years, however, the number of cases determined by way of summary judgment or

is a general tendency for them to approve it without substantive changes.[7] Arguably, this tendency is in keeping with a certain inclination toward or preference for out of court settlements, as opposed to often lengthy and complex traditional court adjudication.[8] This trend results from a combination of different factors: notaly, the high and prohibitive costs of litigation, increasingly complex and lengthier cases, the implicit encouragements by the judges to settle.[9]

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motions to strike the pleadings on the grounds they disclose no cause of action has increased. The settlement rate, therefore, is diminishing slightly."). Also see generally John C. Coffee Jr., "Class Wars: The Dilemma of Mass Tort Class Actions" (1995) 95 Colum. L. Rev. 1343 ["Coffee, Class Wars"]. Also interesting and important was U.S. District Court. N.D. of Ill. Judge Ruben Castillo's statement at a Canadian Bar Association Conference in Montreal on October 29, 2010, that 89% of all Federal Court cases are settled in the United States.

[7] See e.g. Thomas E. Willging et al., "An Empirical Analysis of Rule 23 to Address Rulemaking Challenges (1996) 71 N.Y.U. L. Rev. 74 at 141 (where the authors conducted an empirical analysis of Rule 23 in four American judicial districts and found that "[a]pproximately 90% or more of the proposed settlements were approved without changes.") ["Willging & Al., Empirical Analysis"]. In Canada, there exists no such authority to my knowledge. However, I can affirm, based on an extensive review of Canadian class action settlements conducted in the context of my doctoral thesis project, that Canadian courts do similarly tend to approve settlements without changes, and in fact do so quasi-automatically. This information is anecdotal, however, and is not supported by statistical evidence.

[8] In fact, the recent decade has seen a gradual decline in trial rates and a corresponding increase in the number of out of court settlements. See e.g. Marc Galanter & Mia Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 Stan. L. Rev. 1339 at 1387 (where the authors then evaluate that 95% of cases in the U.S. federal system are resolved prior to trial). In Canada, see Donalee Moulton, "Vanishing Trials: Out-of-Court Settlements on the Rise", *The Lawyers Weekly* (October 17, 2008) online: http://www.lawyersweekly.ca/index.php?section=article&articleid=784. For statistics on the Canadian decline in trial rates, see e.g. conference papers from the Canadian Forum on Civil Justice, available at http://cfcj-fcjc.org/publications/itf-en.php; Pierre Noreau, « La justice est-elle soluble dans la procédure?–repères sociologiques pour une réforme de la procédure civile » (1999) 40 Cahiers de droit 33.

[9] Marc Galanter, "The Hundred Year Decline of Trials and the Thirty Years War" (2005) 57 Stan. L. Rev. 1256 at 1264 ["Galanter, Hundred Year Decline"]. See also Judith Resnik, "Migrating, Morphing and Vanishing: The Empirical Normative Puzzles of Declining Trial Rates in Courts (2004) 1 J. Empir. Stud. 3.

Before the proposed settlement described above is approved, and tens, hundreds, thousands, millions of class members are bound to the settlement outcome, the Ontario settlement judge will ask: were the settlement provisions negotiated following a fair and equitable process, and are they, in fact, fair, reasonable and adequate for the class as a whole?

Other, more specific questions may also be asked, such as whether the consent provided in Article 1 been properly provided; whether the $35 million compensation provided in Article 3 is sufficient, fair and reasonable, given that $85 million will have been disbursed by the defendants; whether the conditions provided in articles 6, 8 and 9 for class members to claim compensation are fair and reasonable to the class members; and whether the notices are clear, whether the right to opt-out and object were provided for, and whether the delays to exercise these rights are reasonable.

I have chosen to study in this thesis the class action law and practice of four jurisdictions that have generated important class action activity and interest in the last few decades:[10] Quebec, Ontario, British Columbia and the U.S. federal courts. In these four key jurisdictions, approvals of proposed class action settlements must be founded upon a conclusion of fairness, reasonableness, and adequacy of the proposed settlement to the class as a whole.[11] Because these three adjectives are subjective and

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[10] Peter Cashman, *Class Action Law and Practice* (Sydney, Aus.: Federation Press, 2007) at 644.

[11] U.S. *Federal Rule of Civil Procedure* ("F.R.C.P.) 23(e) establishes that a class action settlement must be "fair, reasonable, and adequate" to be approved judicially. By contrast, in Canada, there is no equivalent statutory provision, such that courts have had to develop a similar standard for the judicial oversight of class action settlements: *Dabbs v. Sun Life Assurance* (1998) O.J. No. 1598 (Gen. Div.) at para. 11 ["*Dabbs No. 1*"]. See also *Killough v. Can. Red Cross Society*, (2007) B.C.J. No. 1262 (B.C.S.C.) ["*Killough*"]; *Rideout v.*

indeterminate, courts have developed lists of factors that they consider relevant in evaluating class action settlement fairness.[12] These factors, however, are worded somewhat differently in the focus jurisdictions, and do not offer reliable or definitive indicia of which settlements should be approved or denied. Hence, the test of fairness, reasonableness, and adequacy of class settlements is varying and unsettled.

Courts will be asked to approve proposed settlements at a so-called "fairness hearing", where they will consider whether the action may be certified (unless it has already been certified), whether the settlement is fair, reasonable, and in the best interests of the members of the class as a whole, and whether the process for the administration of the proposed settlement is workable. At that stage, courts have a tremendous responsibility toward class members and the public because they are asked to adjudicate the rights of numerous plaintiffs, both named and unnamed, according to their stated or presumed interests. They are presented with an agreement that the settling parties have unanimously consented to, and are asked to approve this agreement integrally, without

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Health Labrador Corp., (2007) N.J. No. 292 (Nwfd'l and Lab. S.C.) ["*Rideout*"] at para. 138; *Sparvier v. Canada (Att. Gen.)*, (2006) S.J. No. 752 (Sask. C.Q.B.); *Pelletier c. Baxter Healthcare Corp.*, REJB 1998-05914 (Qc. Sup. Ct.) at 10 ["*Pelletier*"]; *Landry c. Syndicat du transport de Montréal*, (2006) J.Q. no. 3043 (S.C.) (QL) at para. 31 ["*Landry*"].

[12] American caselaw [Federal]: *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–24 (3d Cir. 1998) ["*Re Prudential*"]; *Detroit* (*City of) v. Grinnell Corp.*, 495 F.2d 448, 463, 18 Fed.R.Serv. 2d 637 (2d Cir. 1974) (implied overruling on other grounds recognized by, *U.S. Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989)) ["*Grinnell*"].

Canadian caselaw: *Dabbs No. 1, supra* note 11 at para. 13; *Jeffery v. Nortel Networks Corp.*, (2007) B.C.J. No. 90 (S.C.) at para. 18 ["*Jeffery*"]; *White v. Canada (Att. Gen.),* (2006) B.C.J. No. 760 (S.C.) ["*White*"]; *Northwest v. Canada (Att. Gen.)*, (2006) A.J. No. 1612 (Alta. C.Q.B.) at para. 23 et seq. ["*Northwest*"] See also, Stanley Marcus et al., eds, *Manual for Complex Litigation*, 4th ed. (Washington, D.C.: Federal Judicial Center, 2004), online : http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf at 316, para. 21.62 (where the factors relevant to the evaluation of class action settlement fairness are listed) [the "*Manual*"].

modifications. They must evaluate whether it is in the best interests of all class members in a context where there is no room for disagreement and where approval is, implicitly, strongly encouraged.

The class action settlement approval process is unpleasant and cumbersome for the judges. It is regulated by a fairness standard that is unclear to the reviewers, and it leads to approval decisions made arbitrarily by imperfectly informed judges. Rubberstamped adjudication is an enticing solution for these judges; a solution that has the potential to jeopardize fairness of process and outcome.

The "just" resolution of disputes implies both a fair process and producing just results.[13] Because the objectives of collective, group or class litigation are access to justice, behaviour modification, and the efficient resolution of claims,[14] I notably seek to evaluate, in this thesis, whether class action settlements respect these larger objectives, involve fair processes and lead to just outcomes.

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[13] Jon Newman, "Rethinking Fairness: Perspectives on the Litigation Process" (1985) 94:7 Yale L. J. 1643. Also see, for a thorough discussion of what makes class settlements fair, Carrie Menkel-Meadow, "Ethics and the Settlement of Mass Torts: When the Rules Meet the Road" (1994-95) 80 Cornell L. Rev. 1159 (Who argues, as main thesis, that the "current ethical rules on conflicts of interests, limitation of practice, and ethics in negotiation and litigation [...] were not drafted with the special issues of mass tort class action settlements in mind, and do not, [...] provide adequate guidance for how these issues should be resolved. Our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for 'aggregate' justice.") ["Menkel-Meadow, Ethics"].

[14] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534. See more generally, Jones, Craig, *Theory of Class Actions* (Toronto: Irwin Law, 2003) and Cassels, Jamie and Craig Jones, *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (Toronto: Irwin Law, 2005). And also Pitel, S.G.A., ed., *Litigating Conspiracy : An Analysis of Competition Class Actions* (Toronto: Irwin Law, 2006); David Hamer & Elizabeth Stewart, *Defending Class Actions in Canada/McCarthy Tétrault*, 2d ed. (Toronto: CCH Canadian, 2007).

To best address these objectives of fair process and just outcomes, I explore the legal policy and reasoning behind the mandatory judicial approval of class settlements, the process by which it is sought and obtained, the currently relevant indicia of settlement fairness and the roles of the principal settlement actors in that context, including the role of the settlement judge. The thesis ultimately suggests a reform of the law applicable to class action settlements in Quebec, Ontario, British Columbia and the United States federal courts.

Also in view of addressing – and achieving – fair processes and outcomes in class settlements, I have organised the thesis according to three principal topics: (1) the settlement approval processes; (2) the principal settlement actors; and (3) the concept of settlement fairness. I critically discuss the approval processes first, to permit readers to understand how settlements are brought about and proposed for approval, how judges evaluate proposed agreements, how they decide whether they are fair to the class members, and what happens after approval is granted. I also discuss the principal settlement actors, notably the class members, class counsel and the class representative, because their roles and responsibilities are important in class settlement approval and implementation. Ethical questions are asked and discussed, in that regard, particularly those related to the relationship and duties of class counsel and their "client".

Because settlement judges are key to preventing abuse in class action settlements, and to both improving the process and finding solutions of reform,[15] I spend a good part of the thesis critically addressing their role

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[15] Deborah R. Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, Calif.: RAND Institute for Civil Justice, 2000), online: http://www.rand.org/pubs/monograph_reports/MR969/ ["*Rand Report*"], at 485 ("[I]t

and how this role can be better fitted to their duties and responsibilities. Finally, I critically discuss both the existing definitions of class settlement fairness and the potential ones, also considering non-class action contexts. Importantly, at the end of each of the first three chapters, I propose hypotheses of reform, relative to the process, roles of the actors and concept of settlement fairness.

In the second part of the thesis, to best support the critical analysis of the processes, actors and notion of settlement fairness, I report the results of the qualitative interviews I conducted of judges from the four jurisdictions. These interviews were principally *informational* and *evaluative*. I sought to better understand the controversy over class action settlements, to learn about trends and issues in the legal and judicial practice of these kinds of settlements, to measure the fairness of processes and outcomes in this context, and ultimately, to test the relevance, feasibility and plausibility of my reform hypotheses. With the interviews, I met each of these objectives. In fact, in addition to becoming more informed about settlement approval practices, I obtained voluntary opinions about my reform hypotheses and properly participated in actual reform, or reform *in action*, in instilling new ideas in some of the judges' minds. This approach has served most appropriate to obtaining multiple and diverse perspectives about class action settlement practices and illuminating the theoretical properties of some of the emerging concepts of this study.

In the thesis' conclusion are definitive proposals for reform of the North American law applicable to class action settlements. These reform proposals arise from my preliminary reform hypotheses, as tested against

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is judges who hold the key to improving the balance of good and ill consequences of damage class actions."); Lafond, "Rôle du juge", *supra* note 5 at Introduction, 1ff..

the qualitative data from the interviews. They build upon the roles and relationships of the principal settlement actors, instead of attempting to "replace or reshape them".[16] They also seek to:

1. Inform[17] judges, counsel and parties (including absent class members) and promote transparency in the judicial practices;

2. Clarify and simplify the fairness standard and relevant fairness criteria, roles of the actors and settlement processes;

3. Bring consistency in the standard and criteria used to evaluate settlement fairness, as well as certainty[18] and predictability of process and outcome in class action settlements;

4. Respect the principal class action law objectives; and

5. Encourage more involvement by class members, by giving these members a voice and more control over the outcome, consistently with traditional, unitary litigation.

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[16] Michael D. Ricciuti, "Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult" (1987-88) 1 Geo. J. Leg. Ethics 817 at 863 (where the author similarly presents a proposal to reform the ethical duties of class counsel in a class settlement context, by building on existing relationships).

[17] See Alexandra Lahav, "Fundamental Principles of Class Action Governance" (2003-4) 37 Ind. L. Rev. 65 at 118 ("Information is power. […] Mandatory disclosure would alter this imbalance, decentralizing power by preventing the asymmetry of information that currently characterizes class actions. […] Disbursing information to all of these actors will destabilize the controlling role of class counsel and empower the other actors to contribute their important voices.").

[18] See e.g. Strathy J. in *Ali Holdco Inc. v. Archer Daniels Midland Co.,* [2010] O.J. No. 2511, at para. 27, quoting *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co*., [1998] B.C.J. No. 2936 at para. 6 ["*Haney*"]: "judicial comity and the goal of certainty in litigation outcomes makes it essential that the courts in the class actions jurisdictions in Canada afford considerable weight to the decisions in other Canadian jurisdictions in identical class action claims."

This thesis seeks to reform the law. Hence, information, transparency, consistency and predictability are key considerations in elaborating this reformed law. Respect for class action goals is also fundamental, in the peculiar context of collective litigation. As for the all-important respect for individual rights, it is key to the maintenance of proper safeguards in this context.

Clarity is also important because it brings certainty and stability to the law and to legal precedent. It also informs the practitioners and users of the legal system about the reasons behind a judicial reasoning, in a field desperate for additional transparency.[19] Clarity leads the public to trust its civil justice system. Law reform should seek to "narrow the field of uncertainty"[20] by focusing on *what the reader will need*, developing "a sense of a reader's likely reaction to a given piece of text."[21] Because the primary readers of my thesis and reform principles are the judges and lawyers, I strive for clarity to best benefit them. Accordingly, this thesis will criticize and seek to clarify many – if not most – of the existing rules relating to the settlement approval process, fairness standard, and role of the settlement judges.

The reform principles will, of course, also be consistent with what I view as the preferred theory or model of the class action, the proper "*raison d'être*" of the class action procedure. Prominent legal scholars have

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[19] James D. Cox, "Making Securities Fraud Class Actions Virtuous" (1997) 39 Ariz. L. Rev. 497 at 524 ("Simply stated, the courts must not only become more active in their reviews but also must make the overall process more transparent.").

[20] A. M. Gleeson, "Clarity or Fairness: Which is More Important?" (1990) 12:2/3 Sydney L. Rev. 305 at 309, quoting Oliver Wendell Holmes, *The Common Law* (1882 Ed., at 127).

[21] Lisa Eichhorn, "Clarity and the Federal Rules of Civil Procedure: A Lesson from the Style Project" (2008) 5 J. Assoc. Leg. Writing Directors 1 at 7. Also see Edward H. Cooper, "Restyling the Civil Rules: Clarity without Change" (2003-04) 79 Notre Dame L. Rev. 1761 at 1761.

advocated two distinct models of group litigation: the "aggregation model" and the "entity model".[22] The first model, also characterized as a "private aggregative dispute resolution model"[23], considers the class action as an essential vehicle to

> [allow] individuals to achieve the benefits of pooling resources against one common adversary. Under this view, the individual who is part of the aggregate surrenders as little autonomy as possible (although some sacrifices are undoubtedly inevitable if the group effort is to have any utility and to afford any economies of scale.)[24]

The second model considers the entity of the class action, rather than the class members individually, to be the litigant and client.[25] Indeed, "the class […] is the client, and its members should play a role not as clients themselves but as representatives of the client."[26] Hence, the litigant is a member of a group and "must tie his fortunes to those of the group with

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[22] See David L. Shapiro, "Class Actions: The Class as Party and Client" (1997-98) 73 Notre Dame L. Rev. 913 at 918 ff. Also see Debra Lyn Bassett, "Constructing Class Action Reality" (2006) Brigham Young University L. Rev. 1415.

[23] Linda S. Mullenix, "Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes" (2004) 57 Vand. L. Rev. 1687 at 1693 ["Mullenix, Taking Adequacy"].

[24] *Ibid*.

[25] *Ibid* at 919.

[26] *Ibid* at 940.

respect to the litigation, its progress, and its outcome."[27] Personal or individual autonomy is restricted for the benefit of the collectivity.

Because the class action seriously restricts both the initial choice to pursue a claim and the subsequent involvement in the conduct of litigation, it disrupts individual litigant autonomy.[28] In the words of Martin H. Redish and Nathan D. Larsen,

> [i]n the class action, absent parties traditionally remain passive, ceding the control of litigation strategy to those who serve as named parties. Even if an absent class member wishes to intervene in the action, his ability to make strategic choices concerning the control of the litigation is usually diluted by the influence and

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[27] *Ibid*. Also see Stephen C. Yeazell, "Collective Litigation as Collective Action" (1989) 1989 U. Ill. L. Rev. 43 at 68 ("Collective litigation sacrifices individual to group welfare, Forced to bring or defend claims as groups, individuals lose the control they might otherwise exert over their lawsuits; sometimes they may also lose substantive rights they would be able to exercise were the suit brought against them individually. In return they gain the various advantages if freedom from full costs of the lawsuit, assurance that only part of the loss will fall on them, and assurance that all the members will share the burdens equally.")

[28] Certain scholars have argued that the traditional adversarial model is not well-suited to the class action device. Martin H. Redish & Nathan D. Larsen, "Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process" (2007) 95 Cal. L. Rev. 1573. Also see Lahav, *supra* note 17 at 75 ("Class actions set the traditional model of adjudication on its head."); Samuel Issacharoff, "Preclusion, Due Process and the Right to Opt Out of Class Actions" (2002) 77 Notre Dame L. Rev. 1057 at 1058 ("[a] class action is simply, when all else is stripped away, a state-created procedural device for extinguishing claims of individuals held at quite a distance from the 'day in court' ideal of Anglo-American jurisprudence.").

> control of other named parties as to be almost non-existent.[29]

I am deeply concerned by this dilution of the individual litigant member's choice, autonomy and voice, without proper safeguards. Thus, my perception of the class action procedure's "raison d'être" is consistent with the first, private aggregative dispute resolution model, and seeks to make judicial review and approval of class settlements "more like traditional adjudication".[30] I advocate, in this thesis, that careful consideration be given to the rights and interests of the class action members in the settlement's negotiation, conclusion and approval, and that individual claimants be given a "meaningful voice" to either participate, comment, object, or opt-out from the litigation and/or its settlement:

> Aggregation promotes settlement, but decreases individual autonomy. One of the principal determinations that must be made to evaluate the fairness of any process that purports to resolve claims en masse is whether the method – be it bankruptcy, class action or other types of aggregation – provides individual claimants with a meaningful voice in the decision to accept the settlement.

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[29] Redish & Larsen, *ibid* at 1586.

[30] See e.g. Jonathan T. Molot, "An Old Judicial Role for a New Litigation Era" (2003-04) 113 Yale L. J. 28 at 58.

> *Providing meaningful voice* differs dramatically from a meaningful choice.[31]

Hence, my view is that the direction and outcome – i.e., the governance[32] – of class action settlement practices should be guided by a concern for the interests and value of the class member's collective day in court. Class members should have the right to participate and voice their concerns in the litigation. Therefore, achievement of fair processes and outcomes in class action settlement practices should be made to depend, in my view, upon the respect of the following four fundamental principles:

(1) Adequacy of representation;
(2) Complete disclosure and transparency;
(3) Inquisitorial justice; and
(4) Respect for the class action law objectives.

Fair settlements obviously require a careful balancing of representation and traditional individualistic values. There is always a risk that the settlement will be crafted in an unfair manner, and that consent of all interested parties to the settlement's substance will be presumed. The parties will settle when they find a "zone of mutual advantage"[33], but the interests of class members cannot be evaluated individually, and are instead expressed vicariously through their representatives and counsel.[34]

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[31] Elizabeth L. Chamblee, "Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements" (2004-05) 65 La. L. Rev. 157 at 216-17.

[32] I hereby use the expression that Alexandra Lahav uses in her article entitled "Principles of Class Action Governance", *supra* note 17.

[33] Geoffrey C. Hazard, "The Settlement Black Box" (1995) 75 B.U. L.Rev. 1257 at 1266-68.

[34] G. Donald Puckett, Note, "Peering Into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements" (1999) 77 Tex. L. Rev. 1271 at 1271. I will further discuss this notion of consent in collective litigation below, in Part I, Chapter I.

Hence, these interests must be carefully aligned with those of their class representatives and counsel.

Fair class settlements also require complete disclosure and transparency of judicial practices, through notices, candid lawyers and parties, and an inquisitorial attitude by a settlement judge who does not rely entirely on the representations made by counsel but instead seeks to find the truth by asking questions and exploring the agreement. Finally, they require that the settlement judge embrace and respect, through the settlement's conclusion and implementation, the five class action law objectives that follow: (1) judicial efficiency and economy; (2) the protection of the interests of absent class members; (3) access to justice, especially for small claimants; (4) deterrence and behaviour modification; and (5) the protection of the defendants from frivolous lawsuits and pressures to settle.[35]

Key questions will be asked in this thesis, relative to the process of class settlement approval, roles of the principal settlement actors – notably, of the settlement judge – and concept of class settlement fairness. Regarding the process of settlement approval, I will notably ask whether two hearings should be made necessary in all cases, whether ordinary

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[35] See e.g. William B. Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, 4th ed., vol. 4 (St. Paul, Minn.: Thomson West, 2002-) at para. 1.6 ["*Newberg on Class Actions*"]; *Canadian Shopping Centres*, *supra* note 26 (for the first complete statement, in Canadian law, of the class action law objectives). For two recent examples of cases in which class action law objectives were considered, see *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 112 (Ont. Sup. Ct. J.) at para. 234 ("in considering any alternative procedure, the court should consider a variety of open-ended factors to determine whether it is a genuine alternative that serves the purposes of a class proceeding; namely, access to justice, behaviour modification, and judicial economy.") and *Main v. Cadbury Schweppes plc*, [2010] B.C.J. No. 1106, at para. 18 ("I am satisfied that the settlement with Cadbury results in a substantial financial penalty that is rationally related to the benefits Cadbury received from the price increases at issue. That, coupled with the promise of cooperation and the publicity attached to the settlement, accomplishes the behaviour modification goals of class proceedings.")

witnesses, experts and the class representatives should testify, and what makes settlement notices adequate. I will also discuss what level and content of evidence should be made required and necessary to prove settlement fairness.

Regarding the roles of the class action settlement actors, I will ask, among many other questions, whether the duties to absent class members differ whether settlement is considered before or after certification, what the role and involvement of class counsel really is and should be, and whether the class representatives are effectively fulfilling their role. In fact, in my reform principles, I believe, as does Judith Resnik, that one should "endeavour to make class action and other large-scale litigation governed by an amalgam of procedural and ethical constraints and obligations imposed on both judges and lawyers."[36] Hence, I will suggest legal and ethical reform regarding the roles of these actors, as well as the role of the class representative. I will also ask whether, notably, the settlement judge may appropriately be a protector of absent class members, whether he should presume fairness of settlement, whether he should be permitted to hire independent counsel to assist in evaluating settlements, and whether there may and/or should be communications between judges across borders in multi-jurisdictional class action cases.

When discussing the definitions of class action settlement fairness, I will wonder whether it really is possible to achieve consensus on the requirements of fairness, what balance should be kept between the fairness of substance and of process, at which levels fairness should be evaluated, and in respect of whom. I will discuss the use of the factors

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[36] Judith Resnik, "Litigating and Settling Class Actions: The Prerequisites of Entry and Exit – Postscript: The Import of *Amchem Products, Inc. v. Windsor*" (1997) 30:3 U.C. Davis Law Rev. 835 at 846 ["Resnik, Litigating and Settling"].

lists, and the individual value of the factors of settlement fairness. I will question some of their intrinsic significance and suggest that other indicia of fairness may be used.

This thesis is divided into two larger parts. Part I addresses the class action settlement laws, and Part II addresses the class action settlement practices. Part I includes chapters I to III, which critically discuss, respectively, the process of settlement approval, the roles of the settlement actors, and the concept of settlement fairness. Part II includes the presentation and analysis of the data found from the qualitative interviews in Chapter IV, as well as a final conclusion containing final recommendations for reform.

In the end, if fairness calls for equity and justice, how can judges *do things the right way* such that *the right thing is done* is class action settlement review and approval?

PART I: CLASS ACTION SETTLEMENT THEORY

CH. I: CLASS ACTION SETTLEMENT DYNAMICS: LAWS AND PROCESSES

A class action is filed against a major corporation. Faced with the threat of high stake liability and costs, the corporation attempts to settle the lawsuit out of court. Negotiations are held by and between the representative and the corporation, through their respective counsel. A settlement is reached. The settling parties then send class members notices informing them of the terms of the settlement. The proposed settlement will be submitted to a judge for approval and to be made effective. Once approved, it will bind all class members who have neither objected nor opted-out.[37] These members will be compensated by the defendant and will lose their right to later sue individually.

The process used to make collective settlements effective and enforceable is peculiar. A series of relationships are created when a class action is filed and subsequently settled. In fact, the judicial approval process is made resolutely more complex and tedious by the series of different actors brought at play. Accordingly, a first, principal objective of this chapter is to explain the class action laws of the four target jurisdictions, used to regulate the class action law and the approval of class settlements, to criticize some aspects of this law, and to generally situate the principal class action settlement dynamics and approval process within a larger context. A second objective of this chapter is to propose reform principles relating to the settlement approval process.

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[37] I discuss this "binding effect" further, below, in section II d. For Canadian references, see notably s. 29 *Ontario Class Proceedings Act*; For U.S. references, see e.g. *Hansberry v. Lee*, 311 U.S. 32 at 42-3 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequarely represented by parties who are present [...]").

I. CLASS ACTION SETTLEMENT LAWS

All four target jurisdictions have fundamentally similar class action systems. In each, the class action is a two-step procedure whereby the action is first "certified" to proceed as a group or "class" action, and second, heard at trial as a "class action" where collective and invididual rights of the class members are determined. Each of the four jurisdictions also has special provisions in its statutory law protecting the rights of absent class members, notably notices, opt-out rights and importantly for this thesis' purposes, a statutory requirement of approval by a judge of all proposed class action settlement agreements. The target systems, however similar, do slightly differ in interesting ways which I will explore.

a. Similarities in the Class Action Statutes across Jurisdictions

Certification is required for a class action to exist in Ontario, British Columbia, in the United States, and in several other jurisdictions which have class action systems.[38] It is also required in Quebec, where certification is statutorily referred to as "authorization".[39] The requirements for certification are also very similar in each of the targeted jurisdictions. First, the proposed group and action must be suitable for class treatment: there must be a minimum number of individuals in the proposed class, an identifiable class of two or more persons, or

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[38] Notably, in the Canadian provinces of Manitoba, Alberta, New Brunswick, Nova Scotia, Newfoundland and Labrador, and Saskatchewan, as well as at the Canadian federal level and in the United Kingdom. See e.g. Rachel Mulheron, *The Class Action in Common Law Legal Systems : A Comparative Perspective* (Portland, OR : Hart Publishing, 2004), for a useful – yet not up-to-date – reference on the class action law applicable in Canada, Australia, England and the United States.

[39] See arts. 1002-3 Quebec *Code of Civil Procedure*, L.R.Q., c. C-25, a. 47 ["Quebec C.C.P."]. Throughout my thesis, I will refer to certification as including the Quebec concept of "authorization", for ease of reference.

impracticability of joinder.[40] There must also be a fair and adequate class representative.[41]

Second, the questions and issues posed must have a certain commonality. In Ontario, "the claims …of the class members [must] raise common issues"[42], in British Columbia, the "questions of fact or law common to the members of the class [must] predominate over any questions affecting only individual members"[43], in Quebec, there must be "identical, similar or related questions of law or fact"[44], and in the United States, "questions

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[40] There are some differences in this requirement of "numerosity". In Ontario and British Colombia, there must be "an identifiable class of two or more persons". See e.g. Ont. *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ["Ont. C.P.A."] s. 5(1)(b)) and *British Columbia Class Proceedings Act*, R.S.B.C. 1996, c. 50 ["B.C.C.P.A."], s. 4(1)(b). By contrast, in the U.S., r. 23(a)(1) of the *Federal Rules of Civil Procedure*, Title 28 U.S.C. ["U.S. F.R.C.P."] provides that "joinder of all members [must be] impracticable". In Quebec, s. 1003(c) C.C.P. similarly provides that joinder (through the application of article 59 or 67 C.C.P. must be "difficult or impracticable".

[41] In Ontario, there must be at least one representative plaintiff, who must "fairly and adequately represent the interests of the class", have a cause of action against each defendant, and have produced a plan for the proceeding "that sets out a workable method of advancing the proceeding and notifying the class members". This representative must also be one who does not have, on the common issues, an interest that is "in conflict with the interests of other class members": Ont. C.P.A., s. 5(1)(e). Also see B.C.C.P.A., s. 4(1)(e) and *Federal Court Rules*, SOR/98-106 ["Can. F.C.R."], R. 334.16(1)(e). Also see *Billette v. Toyota Can. Inc*., 2009 QCCS 2524 (Qc. Sup.Ct.); *Imperial Tobacco Can. Ltée v. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694 at para. 5ff.; *Bouchard c. Agropur*, [2006] R.J.Q. 2349 (C.A); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*. (2001), 51 OR (3d) 603 (Sup.Ct.) (where the courts held that there must be one representative plaintiff for each of the defendants, which has a cause of action against each and every defendant). In the U.S., F.R.C.P. 23(a)(3) contains a typicality requirement that has been interpreted as requiring that the class representative have had dealings with the defendants. In Quebec, Art. 1003(d) requires that the representative be in a position to represent the class adequately. The requirements of adequacy of representation are further discussed below in the discussion about the roles of the settlement actors.

[42] Ont. C.P.A., s. 5(1)(c).

[43] B.C.C.P.A., s. 4(2)(a).

[44] Art. 1003(a) C.C.P.

of law or fact common to class members [must] predominate over any questions affecting only individual members."[45]

Third, there is a common requirement of superiority in the targeted common law jurisdictions which requires courts to exercise broad discretion when determining whether a class action should be certified.[46] Superiority is described differently in the targeted statutes. For example, Ontario courts must find that the class action would be the "preferable procedure for the resolution of the common issues"[47] without further indicia of preferability, whereas British Columbia and the United States Federal Rule list a number of factors relevant to the superiority determination, such as whether the class action would be difficult to manage or administer if it were sought by other means.[48]

Certification in Ontario and British Columbia depends upon whether:[49]

1. the pleadings disclose a cause of action;
2. there is an identifiable class;
3. the proposed representative is appropriate;
4. there are common issues;

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[45] FRCP 23(b)(3).

[46] Mulheron, *supra* note 38 at 219.

[47] Ont. C.P.A., s. 5(1)(d).

[48] B.C.C.P.A., s. 4(2) (determining "whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues"); U.S.F.R.C.P. 23(b)(3) (listing the criteria relevant to a finding "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy").

[49] See e.g. Ont. CPA, s. 5(1) and B.C.C.P.A., s. 4 (1).

5. the class action is the preferable procedure.

In Quebec, there is no superiority requirement, but the Supreme Court of Canada in *Marcotte* has arguably replaced this requirement by a preoccupation with proportionality.[50] Quebec's requirements for authorization are listed in Article 1003 C.C.P., which requires:

(a) identical, similar or related questions of fact or law;

(b) the facts alleged seem to justify the conclusions sought;

(c) the composition of the group renders difficult or impractical [representation by mandate (agency) or joinder of claims]; and

(d) the class representative can adequately represent the class.

Proportionality must also be considered, however, pursuant to Article 4.2 of the Quebec *Code of Civil Procedure* and the Quebec caselaw,[51] in such a way as to require that "the proceedings [chosen] are proportionate, in

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[50] See e.g. *Marcotte v. Longueuil (Ville de)*, [2009] 3 S.C.R. 65. Also see the recent decision of *Brown* c. *Roy*, 2010 QCCS 3657.

[51] *Brown v. Roy*, *ibid*, where the court held that proportionality must be considered in addition to the requirements of art. 1003 C.P.C., of course with the reservations expressed within the judgment. Also see *Gen. Motors Can. Ltee c. Billette*, 2009 QCCA 2476. But see *Apple Can. Inc. c. St-Germain*, 2010 QCCA 1376 (where proportionality held not a factor that can justify refusal to authorize).

terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute […]."[52]

U.S. F.R.C.P. 23 describes the prerequisites for pursuing a case as a class action and divides class actions into three categories. As such, a class will be certified if it meets all the requirements of Rule 23(a) and falls into one of the categories described by Rule 23(b). Rule 23(a) requires that the certification proponents prove the following prerequisites for a class action (all of which must be met):

> (1) *numerosity* –the class must be numerous enough to make joinder of the members impracticable;
>
> (2) *commonality* – there must be questions of law or fact that are common to the class;
>
> (3) *typicality* – the claims or defenses of the class representative must be typical of the claims or defenses of the class; and
>
> (4) *adequacy* – the representative must fairly and adequately represent and protect the interests of the class.

The three possible class action categories are described in Rule 23(b)(1), (b)(2), and (b)(3). The first, 23(b)(1) category includes cases where holding

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[52] Art. 4.2 Quebec *Code of Civil Procedure*.

individual separate non-class actions would lead to unfair results.[53] The second, 23(b)(2) category applies to lawsuits seeking an injunction rather than damages.[54] The third, 23(b)(3) category covers all other types of class actions.[55]

In class actions brought pursuant to either (b)(1) or (b)(2), the courts *need* not require notification of the lawsuit to the absent class members.[56] Accordingly, in these two instances, class members will be bound by its conclusion. By contrast, in class actions brought under (b)(3), the courts must order the named plaintiff(s) to send a notice in the form of a letter to all eventual class members, identifiable "with reasonable effort", notifying them of the lawsuit.[57] Courts will then usually require that the right of opt-out be exercised within 30 to 60 days after issuance of the notice.[58] In sum, under United States Federal law, aside from the opt outs of (b)(3)

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[53] F.R.C.P. 23(b)(1) ("An action may be maintained as a class action if […] the prosecution of separate actions […] would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.").

[54] F.R.C.P. 23(b) ("An action may be maintained as a class action if […] the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.").

[55] F.R.C.P. 23(b)(3) ("An action may be maintained as a class action if […] the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.").

[56] F.R.C.P. 23(c)(2)(A).

[57] F.R.C.P. 23(c)(2)(B). Also see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 at 174, 179 (1974). The balance of Rule 23 describes, among other things, mandatory notice requirements for Rule 23(b)(3) class actions, discretionary notices and other orders available to a court during the conduct of the litigation, and procedures in the event of voluntary dismissal or settlement of a class action.

[58] *Manual*, *supra* note 12 at para. 21.321.

class actions, class members are bound by the outcome, even if they were never notified of the action.

All Canadian class action statutes similarly provide mechanisms by which class members will become informed of class proceedings and bound by them. Ontario and Quebec follow a traditional opt-out model,[59] while British Columbia uses a mixed opt-out model in which class members resident in the province may elect to opt out and non-residents must opt *into* the action.[60]

In the three chosen Canadian jurisdictions, the certification order and notice to class members must include directions as to the manner and specific delay by which members may exercise their option.[61] In Quebec, that delay cannot be shorter than thirty days, nor longer than six months after issuance of the notice of certification.[62] If certification is instead granted for settlement purposes only, the court will combine the notices of class certification and settlement.[63]

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[59] Ont. C.P.A., s. 9 ("Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order"); Quebec's Arts. 1005 *in fine* C.P.C. ("The judgment also determines the date after which a member can no longer request his exclusion from the group; the time limit for exclusion cannot be less than 30 days nor more than six months after the date of the notice to the members. Such time limit is peremptory; the court may nevertheless permit the exclusion of a member who shows that in fact it was impossible for him to act sooner.") and 2848 *Civil Code of Quebec* (L.Q., 1991, c. 64.) ["Quebec C.C.Q." or "C.C.Q."].

[60] B.C.C.P.A., s. 16.

[61] Art. 1005 C.PC., B.C.C.P.A., s. 19(6); Ont. C.P.A., s. 6(b).

[62] Art. 1005 *in fine* C.P.C.

[63] Nicole Duval-Hesler, "Le recours collectif: un parcours complexe" (2004) 64 R. du B. 385 at 400.

b. Statutory Laws Relating to Class Action Settlements in the Four Target Jurisdictions

In traditional, non-class or unitary litigation, settlement is allowed to occur without court approval as the settlement parties are in that case the only ones concerned by this out-of-court outcome. By contrast, settlements or discontinuances in class action litigation must, in all Canadian jurisdictions and in American federal courts, be approved by a court to be made effective.[64] This subsection will serve to outline the relevant laws regarding approval of class action settlements throughout North America.

i. Ontario, British Colombia and Quebec Statutes

Section 29 of the Ontario C.P.A. provides that proceedings commenced as class proceedings pursuant to the Act (and yet uncertified) *or* certified as such may be discontinued *only* once court approval is granted. Importantly, it also provides that a class settlement will bind all class members only once the court approves it, and once this court has considered the necessity of giving notice of its existence:

> **29.** (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act *may be discontinued or abandoned only with the approval of the court*, on such terms as the court considers appropriate.
>
> Settlement without court approval not binding

[64] See *supra*, footnote 11.

(2) A settlement of a class proceeding *is not binding unless approved by the court*.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court *binds all class members*.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.[65] [italics added]

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[65] Subsections 29 (2), (3) and (4) of the Ont. C.P.A. The New Brunswick class proceedings statute also mandates the judicial approval of settlements both before and after certification, and emphasises the binding effect of such settlements. (Ss. 1 and 37 of New Brunswick's *Class Proceedings Act*, S.N.B. 2006, ch. C-5.15.) Nova Scotia's *Class Proceedings Act*, S.N.S. 2007, c. 28 contains the same requirement of settlement approval prior and

In British Columbia, by contrast, settlements of uncertified class actions do not require the court's approval to be made effective.[66] The B.C. class proceedings statute provides language similar to that of the Ontario statute regarding the need for judicial approval, the binding effect of settlement, and the requirements of issuance of settlement notices. However, it defines a "class proceeding" or "class action" as a proceeding or action *certified* as such.[67] The B.C. Act reads, in relevant part:

> Settlement, discontinuance, abandonment and dismissal

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post certification. (Ss. 2(d), 7(3) and 38 of Nova Scotia's *Class Proceedings Act*.) This Act interestingly provides that a court may appoint a lawyer to represent the interests of "unascertainable" members of the class on a motion to approve a proposed class action settlement. This lawyer will represent the members of the group and seek to protect the interests that these members will be anticipated or projected to have in the class action settlement. This additional protection of prospective class members is a great way of ensuring that all members of the class are considered and provided for in the settlement. Rule 68.07, *Nova Scotia Civil Procedure Rules*, Judicature Act R.S.N.S. 1989, c. 240, s. 46is online: http://www.courts.ns.ca/rules/cpr_consolidated_10_04_21/cpr_consolidated_rules_10_04_21.pdf. The Rule reads as follows :

> Settlement involving child or person unable to manage affairs
>
> 68.07 (1) A judge may appoint a lawyer to represent the interests of members of a class or subclass who are children, who cannot manage their own affairs, or who are unascertainable on a motion to approve a settlement of a class proceeding, or a settlement of issues common to a subclass.
>
> (2) The judge may provide for payment of the lawyer by a party or out of the proceeds of a settlement.

[66] Subsections 1, 2 and 35 B.C.C.P.A. Also see, for similar provisions in other provinces: Ss. 2 and 35 of the Alberta *Class Proceedings Act*, S.A. 2003, c. C-16.5 ["Alta. C.P.A."] (also see Bill 20, *Class Proceedings Amendment Act*, 2010, Third Sess., 27th Legislature, 59 Eliz. II, introduced to the Alberta Legislative Assembly on November 1, 2010 ["Bill 20"]); Ss. 2 and 38 of Saskatchewan's *Class Actions Act*, S.S. 2001, Ch. C-12.01 ["Sask. C.A.A."]; Ss. 1 and 35 of Manitoba's *Class Proceedings Act*, C.C.S.M. c. C130 ["Man. C.P.A."]; Ss. 2 and 35 of the Newfoundland and Labrador's *Class Actions Act*, S.N.L. 2001, c. C-18.1 ["N. & L. C.P.A."].

[67] S. 2 B.C.C.P.A.

35 (1) A class proceeding *may be settled, discontinued or abandoned only*

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(3) A *settlement under this section is not binding unless approved by the court*.

(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must *consider whether notice should be given* under section 20 and whether the notice should include

> (a) an account of the conduct of the proceeding,
>
> (b) a statement of the result of the proceeding, and
>
> (c) a description of any plan for distributing any settlement funds. [italics added]

The "settlement class" is one kind of pre-certification settlement which presents a class approved strictly in view of negotiating, concluding and making a settlement agreement effective with the defendants. This kind of settlement has recently grown to be so popular its evolution has been characterized as "meteoric".[68] Practically speaking, defendants will be interested in the settlement of their case if they can be guaranteed that the entire class will be bound by the agreement.[69] That is why pre-certification settlements are most often concluded on the condition that the class action be formally certified. Nonetheless, the settlement class action may be criticized because it suggests collusive activity[70] and provides a

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[68] Martin H. Redish & Andrianna D. Kastanek, "Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process" (2006) 73 U. Chi. L. Rev. 545 at 547. Also see Willging & Al., *supra* note 5 at 35 (where the authors indicated that 39% of the cases that they had studied were certified for settlement purposes only).

[69] *See* Richard A. Nagareda, *Mass Torts in a World of Settlement* (Chicago: The University of Chicago Press, 2007) at 163 ["Nagareda, Mass Torts"] ("Defendants want any class settlement to mark the achievement of an enduring peace in the litigation, not just a flimsy peace in our time.").

[70] Susan P. Koniak, "Feasting While the Widow Weeps: *Georgine v. Amchem Prods. Inc*." (1995) 80 Cornell L. Rev. 1045 at 1117, 1120.

"nonlitigation means of resolving potential disputes […,] approved and enforced through the federal courts".[71]

In Quebec, Article 1025 C.C.P. and articles 2631 to 2637 of the *Civil Code of Quebec* ("C.C.Q.")[72] mandate that proposed settlements of certified class actions be approved judicially. In addition to providing a list of required contents of the settlement notice, Article 1025 C.C.P. provides that "[t]ransaction, acceptance of a tender or acquiescence, except where it is unconditional in the whole of the demand, is valid only if approved by the court. This approval cannot be given unless a notice has been given to the members."[73] Since Article 1025 C.C.P. forms part of the Code's Title III of Book IX entitled "Conduct of the Action", settlements that occur during the course of the action must be judicially approved.

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[71] Redish & Kastanek., *supra* note 68 at 546 (also rightly noting that "absent class members will be bound by the terms of the settlement, regardless of whether a truly adversarial adjudication of the certification issue would have resulted in a different conclusion." *Ibid* at 550). Also see Stephen C. Yeazell, "The Past and Future of Defendant and Settlement Classes in Collective Litigation" (1997) 39 Ariz. L. Rev. 687; Roger C. Cramton, "Individualized Justice, Mass Torts, and the 'Settlement Class Action: An Introduction' (1995) 80 Cornell L. Rev. 811; Koniak, *ibid*.

[72] Art. 2631 C.C.Q. defines a transaction as "(...) a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations." Art. 2633 C.C.Q. provides that "(a) transaction has, between the parties, the authority of a final judgment (*res judicata*)." Also see *Règlement de procédure civile*, c. C-25, r. 8 ["Qc. R.p.c."], which provides at Règle 63(e), that every motion made to approve a proposed class action settlement pursuant to Art. 1025 C.C.P. must indicate the amounts that will be refunded to the *Fonds d'aide aux recours collectifs* if financing was made available through it. Also see the *Loi sur le recours collectif*, L.R.Q., c. R-2.1 ["Quebec L.R.C." or "L.R.C."], arts. 30, 45, which notably provide that when funding is made available by the Fonds, the Court must hear a representative of the Fonds before approving a proposed settlement. In addition, when the settlement provides for a collective recovery, the Fonds may claim a certain percentage of the leftover monies: see Art. 1033 C.P.C., art. 42 L.R.C. and art. 1(1) and (2) of the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*, R.R.Q., c. R-2.1, r. 3.1.

[73] Rule 334.29(1) Can. F.C.R. similarly provides that class proceedings may be settled only with the approval of the court. According to ss. 2 F.C.R., the settlement will, on approval, bind every class or subclass member who has not opted out of or been excluded from the class proceeding.

Pre-certification settlements, on the other hand, are implicitly permitted.[74] They have an individual reach since the action is not yet certified.[75] Hence, the representative will only, in theory, be allowed to transact in the name of the class when the class action is certified, as appears from Art. 1005 C.P.C. Nonetheless, pre-certification settlements may be authorized by the court and bind the members if this court has authorised the class action *pro forma*, for settlement purposes only.[76]

Similar to its common law legislative counterparts, Article 1025 C.C.P. fails to provide additional requirements regarding the contents and form of class settlements, leaving the task of defining such requirements to the judges and legislator. I will address the details of these requirements of settlement fairness in Chapter III, below, as well as the difficulties encountered when attempting to define and apply this abstract standard.

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[74] See generally Pierre-Claude Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (Montréal : Thémis, 1996) at 450 ["Lafond, Le recours collectif"] ("[…] Pour éviter les règlements hors cour manifestement déraisonnables ou qui ignorent les intérêts des membres, l'article 1025 du *Code de procédure civile* exige l'approbation judiciaire préalablement à toute transaction, […]. Tout règlement accepté à l'encontre de cette disposition est nul et de nul effet. Le contrôle du tribunal sur les règlements hors cour tire sa justification de l'obligation pour le juge de s'assurer que le groupe a été représenté adéquatement durant les négociations et que la transaction proposée est ainsi proposée dans le meilleur intérêt des membres."). Parties to a proposed class action could find it strategically beneficial to conclude a settlement pre-certification with only a few members, as this woul affect the number of class members – i.e., the numerosity requirement – to certification of the proposed class action. Nonetheless, using the class action device for this purpose is clearly abusive, and remains an exceptional occurrence. Post-certification settlements or settlements concurrent with certification – i.e., settlement classes – are more popular as they have a collective impact and bind all class members.

[75] See arts. 1010.1 and 1015 C.C.P. See also: *Meese v. Corp. Financière Globex*, J.E. 2000-179 at 47 (Sup. Ct..), appeal dismissed J.E. 2001-975 (C.A.), leave to appeal to the S.C.C. dismissed on June 25, 2001, [2001] C.S.C.R. no. 330.

[76] *Pelletier*, *supra* note 11. Also see *Melvin c. Maple Leaf Foods inc.*, 2009 QCCS 1378; *Goudreault c. Service Garantie Québec inc.*, 2009 QCCS 1866; *Grégoire c. Epson Can. Ltée*, 2009 QCCS 908.

In sum, in the Canadian focus jurisdictions, British Columbia and Quebec both permit pre-certification settlements without court approval, while Ontario requires that court approval be granted anytime a settlement is proposed after the filing of the motion for certification. However, in practice, class action settlements are often concluded before certification and made conditionally effective upon certification, or concluded after the action is formally certified, as will be further discussed below.

ii. United States Federal Statutes

The United States federal law has addressed the existing ambiguity in the approval of "pre" and "post" certification settlements by amending Rule 23(1)(e) F.R.C.P to clarify that settlements and voluntary dismissals must be approved by the courts *only* if the class action is *certified*:

> (e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE.
>
> The claims, issues, or defenses *of a certified class may be settled*, voluntarily dismissed, or compromised *only with the court's approval*.
>
> The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) The court *must direct notice* in a reasonable manner to all class members who would be bound by the proposal.

> (2) If the proposal would bind class members, the court *may approve it only after a hearing and on finding that it is fair, reasonable, and adequate*.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) *Any class member may object* to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.
>
> [italics added] [77]

Accordingly, similar to the Quebec and British Columbia class action statutes, Rule 23(e) mandates the judicial review of the settlement, voluntary dismissal, or compromise, of certified cases, but precertification

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[77] There are similar requirements for judicial review of class action settlements in state class action rules. For this thesis' purposes, I have decided not to review the state rules, and instead, focus on the federal law. For additional information about the various state class action law statutes, see Thomas A. Dickerson, *Class Actions: the Law of 50 States*, looseleaf (consulted on October 15, 2010) (New York: Law Journal Press, 1988-).

settlements need no such approval.[78] Interestingly, the *American Law Institute*'s *Principles of the Law of Aggregate Litigation* suggest a change to the federal system in their Section 3.02(b), making approval of pre-certification settlements mandatory.[79]

Class actions cannot be compromised without first obtaining court approval *and* affording proper, "reasonable" notice (and an opportunity to be heard) to class members.[80] Since these members are afforded no right to opt-out from 23(b)(1) or (b)(2) class actions, courts can effectively deny a request to opt-out filed upon receipt of a notice of settlement.[81] By contrast, class members in 23(b)(3) class actions have the right to opt out of the lawsuit, and all those who will not have opted out from the action will be bound by a proposed settlement.[82]

Rule 23(e)(4) provides that the court may deny a proposed settlement in certified class actions under Rule 23(b)(3) if members of the proposed class have not been given a chance to opt out after the parties announced the settlement terms. Notwithstanding this safeguard, the rights of class members remain imperfect because many of them will never be properly

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[78] The requirements of Rule 23(e) are a specific exception to the general rule in F.R.C.P. 41 (a) (1) that voluntary dismissals do not require court approval: "subject to the provisions of Rule 23(e)... an action may be dismissed by the plaintiff without order of court... ". Rule 23.1 contains a similar requirement for shareholder derivative actions.

[79] Section 3.02 (b) of the American Law Institute, *Principles of the Law of Aggregate Litigation* (St. Paul, MN: American Law Institute Publishers, 2010) ["*ALI Principles*, 2010"]. I will further address these Principles in Chapter II, *infra*.

[80] F.R.C.P. 23(e)(1)(B).

[81] See e.g. Mollie A. Murphy, "The Intersystem Class Settlement: Of Comity, Consent, and Collusion" (1999) 47 U. Kan. L. Rev. 413 at 452–53.

[82] Under U.S. federal law, constitutional due process mandates that absent class members be given "adequate notice, adequate representation and adequate opportunity to opt out" before a final judgment in the lawsuit can bind them. See e.g. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. (1985). But see *Hansberry,* supra note 37 at 42-3 (1940).

notified of the class action and/or of its settlement, but will remain bound by them both:

> A court is permitted, but not required, to insist that the parties offer absent class members a new opportunity to opt out once the terms of the settlement have been crafted [F.R.C.P. 23(e)(3)]. Any class members who could not originally be identified "through reasonable effort" are bound by the settlement even if they never were sent any notice of the class action. The same is true of class members who were sent, but who never received, notice letters.[83]

In the end, Rule 23 does provide more detailed qualitative requirements regarding the standard of class settlement approval than its Canadian legislative counterparts as it properly codifies the standard of fairness, reasonableness and adequacy. However, it too fails to provide further detail regarding the content and form of class action settlements, the factors relevant to an assessment of fairness, reasonableness and adequacy of settlement, and the evidence required for the settlement judge to conclude to such settlement fairness.

More detail is provided regarding settlement fairness in the recently adopted *Principles of Aggregate Litigation* published by the *American Law*

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[83] John Bronsteen, "Class Action Settlements: An Opt-In Proposal" (2005) 4 U. Ill. L. Rev. 903 at 910.

Institute[84], which I further discuss in Chapter III. Meanwhile, the concept of settlement fairness was principally developed in the North American courts, which have held that evaluation of a proposed settlement's fairness requires a consideration of the settlement's terms and of the negotiating process leading to settlement, the whole in accordance to a series of lists of factors.

- **Coupon Settlement Approvals Pursuant to the *Class Action Fairness Act***

On February 18, 2005, the *Class Action Fairness Act* ("CAFA") was formally enacted in the United States.[85] The Act applies to class proceedings filed on or after the day of the Act's enactment[86], whether or not they have yet been certified[87], and also to "mass actions."[88] Originally conceived primarily to limit the exorbitant legal fees frequently awarded to plaintiff lawyers and better protect the interests of the individual class members, the Act's principal stated purposes is "to assure fair and prompt recoveries for class members with legitimate claims."[89] By expanding the

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[84] *ALI Principles*, 2010, *supra* note 79. These Principles interestingly include a definition of "aggregate settlement" in Paragraph 3.16.

[85] *Class Action Fairness Act of 2005*, 109 Cong., 1st Sess., S. 5 ["CAFA"].

[86] CAFA, § 1332.

[87] CAFA, §1332(d)(8).

[88] CAFA, §1332(d)(11), where mass actions" are defined as cases that are *not* brought as class actions, in which the "monetary relief claims of 100 or more persons are proposed to be tried jointly."

[89] CAFA, Sec. 2(b)(1). Also see e.g. Stephen B. Burbank, "The Class Action Fairness Act of 2005 in Historical Context" (2008) 156 U. Penn. L. Rev. 1439; Emery G. Lee III & Thomas E. Willging, "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts", Federal Judicial Center, April 2008, online: www.uscourts.gov/.../Fourth%20Interim%20Report%20**Class**%20**Action**.pdf ["Lee & Willging, Impact of CAFA"].

scrutiny over class action settlements and federal jurisdiction over class actions, the Act amended U.S. F.R.C.P. 23 in such a way as to impact current and future class action litigation.[90]

At the heart of CAFA is the "Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions"[91], which applies to all federal class actions and not just CAFA-enabled ones and essentially seeks to restrict coupon settlements and modify other settlement processes. Coupon settlements are "one species of a broader category of nonpecuniary class action settlements in which consideration other than an immediate cash payment is given to class members in exchange for a release of legal claims against the defendant."[92] One example of a typical coupon settlement is where the class member is offered the possibility to purchase a future product from the defendant's company at a reduced rate or price. In that case, because the compensation is a product manufactured by the defendant, one may wonder whether the defendant truly is punished for his inproper behaviour and deterred from wrongful practices in the future.[93]

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[90] Lee & Willging, *ibid*.

[91] CAFA, Sec. 3 §§ 1711-1715.

[92] Geoffrey P. Miller & Lori, S. Singer, "Nonpecuniary Class Action Settlements" (1997) 60 Law & Contemp. Probls. 97 at 98.

[93] Option consommateurs, "Les règlements coupons: la justice devient-elle un programme de fidèlisation?" (2007) [unpublished], online: http://www.option-consommateurs.org/documents/principal/fr/File/rapports/recours_collectifs/oc_reglements_coupons_200706.pdf; Christopher R. Leslie, "The Need to Study Coupon Settlements in Class Action Litigation" (2005) 18 Geo. J. Leg. Ethics 1395 at 1396 (where Leslie criticizes coupon settlements because they 1) frequently do not "provide meaningful compensation to most class members," 2) "fail to disgorge ill-gotten gains from the defendant," and 3) "may force class members "to do future business with the defendant.") ["Leslie, Need to Study"]; Christopher R. Leslie, "A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation" (2002) 49 U.C.L.A. L. Rev. 91 ["Leslie, Market-Based Approach"].

In several instances, the coupons will be approved by the courts and held to be fair and reasonable and in the best interest of the class as a whole, especially when coupons are accompanied by another form of compensation, or where they are made transferable.[94] They are on occasion surprisingly embraced as being "ideal"[95] compensations, given the totality of the settlement, its impact on the class at large, and "the class size, the complexity of the transactions and their idiosyncratic nature".[96] In other instances, these settlements are also seriously criticized. For example, one court rejected a proposed settlement agreement that would have provided hundreds of thousands of Civic Hybrid owners with rebates on future purchases of Honda vehicles, and ironically, simultaneously awarded plaintiffs' attorneys nearly $3 million in fees.[97] In another instance, a coupon settlement was rejected and held unfair to class members because it provided no repair or indemnification process for the defective trucks at stake, and treated certain classes differently from the others.[98]

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[94] *Mortillaro v. Cash Money Cheque Cashing Inc.*, [2009] O.J. No. 2904 at paras. 15-16 (Sup.Ct.J.) (where coupon settlements were considered to "serve" the class members and the defendant, and to "increase the value of the settlement").

[95] *Nantais v. Easyhome Ltd*., [2005] O.J. No. 5805 (Sup.Ct.J.).

[96] *Ibid*.

[97] See Civic Hybrid Settlement, online: http://www.law.com/jsp/article.jsp?id=1202444546391&rss=newswire.

[98] *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 818-19 (3d Cir. 1995), cert. denied, 516 U.S. 824, 116 S. Ct. 88 (1995) (where the Court vacated the order certifying the provisional class and approving the settlement, thereby rejecting the settlement as "unfair" because it was founded upon compensation of class members by a $1,000 nontransferable coupon redeemable toward the purchase of a new G.M. or Chevrolet truck.) ["*In re Gen. Motors*"]: at para. 178 ("Here the adequacy of the certificate settlement is particularly dubious in light of the claims alleged and the relief requested in the original complaint. The coupons offered by GM simply do not address the safety defect that formed the central basis of the amended complaint filed barely four months

CAFA's Consumer Bill of Rights restates Federal Rule 23(e)(2)'s requirement of settlement fairness in its Section 1712, but adds that the court's finding in that regard must be made *in writing*.[99] It also authorizes federal courts to give the unclaimed funds to the government or to charities, using a *cy près* approach.[100] The relevant Section reads as follows:

> Judicial Scrutiny of Coupon Settlements – In a proposed settlement under which class members would be awarded coupons, the *court may approve the proposed settlement only after a hearing to determine whether*, and making a written finding that, the *settlement is fair, reasonable, and adequate for class members*. The court, in its discretion, may also require that a proposed settlement agreement provide

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before the settlement."). On coupon settlements, more generally, see e.g. Lisa M. Mezzetti and Whitney Case, "FTC Workshop – Protecting consumer Interests In Class Actions, September 13-14, 2004: The Coupon Can Be the Ticket: The Use of "Coupon" and Other Non-Monetary Redress in Class Action Settlements" (2005) 18 Geo. J. Legal Ethics 1431; Steven B. Hantler and Robert E. Norton, "Coupon Settlements: The Emperor's Clothes of Class Actions - FTC Workshop- Protecting Consumer Interests in Class Actions" (2005) 18 Geo. J. Legal Ethics 1343;. Leslie, "Market-Based Approach", *supra* note 93; J. Brendan Day, "My Lawyer Went to Court and All I Got Was This Lousy Coupon!" (2008) 38 Seiton Hall L.Rev. 1, cited in *Figueroa v. Sharper Image Corp.*, 517 F. Supp.2d 1292 (Fla. Dist. Ct. 2007) ["*Figueroa*"] at para. 3. In fact, coupon settlements have been strongly criticized by several authors. See *id*. Also see: Note, "In-Kind Class Action Settlements" (1996) 109 Harv.L.Rev. 810 (where a variety of coupon settlements are described and where the author discusses how uncertain the valuation of such settlements is for judges who must evaluate the fairness of settlements); Gary E. Davidson, "Should Coupons Be Clipped? The Problems Inherent to the Settlement of Class Actions with Non-Cash Tender" [2000] Int'l Travel L.J. 149.

[99] CAFA, §1712(e).

[100] *Ibid*. Another major change that this Section brings to the existing law is the requirement that federal judges now evaluate the percentage of fees relating to coupon settlements based on the value of the coupons that will already actually have been redeemed, "as opposed to the value of the coupons arguably available". *Ibid* at §1712(a).

> for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.[101] [italics added]

CAFA also importantly provides new substantive and procedural requirements to proposed settlements. Substantively, settlements cannot "constitute a net financial loss to individual plaintiffs [, unless the court makes a] written finding that non-monetary benefits to the class members substantially outweigh the monetary loss."[102] This provision serves to prevent cases such as *Kamilewicz v. Bank of Boston*[103], where the court first approved a class action settlement relating to fee overcharges by the Bank of Boston and awarded the 700,000 class members a small compensation and plaintiff attorneys' extravagant attorney fees. To the members' great surprise, that fee was deducted from their escrow accounts, *pro rata*, and caused several of them a net loss.

In addition, CAFA forbids "discrimination based on geographic location", and class settlements that will compensate local plaintiffs differently from out of state plaintiffs.[104] Importantly, the Act provides that federal and state officials must be notified of the proposed settlement "[n]ot later than

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[101] CAFA §1712(e).

[102] CAFA §1713.

[103] *Kamilewicz v. Bank of Boston,* 92 F.3d 506 (7th Cir. 1996).

[104] CAFA §1714.

10 days after a proposed settlement of a class action is filed in court".[105] This notice must notably include a copy of the complaint and appended materials, notice of the fairness hearing, proposed agreement and of the notice to class members.[106] If the notice is not properly sent to the appropriate authorities, a class member "may refuse to comply with and may choose not to be bound by [the] settlement agreement."[107]

The Act does not require that government officials take action with regards to the proposed settlement. These officials, nonetheless, must be given time to comment on the proposed settlement if they wish to, and ninety days must pass before final judgment can be issued on approval of the proposed settlement.[108] While this provision must "not be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or state officials"[109], it is nonetheless important as it seeks to involve public officials in the process of settling class actions.

CAFA further provides new jurisdictional rules that expand jurisdiction for diversity class actions to classes with more than one hundred class members under certain conditions.[110] These rules also loosen the removal rule.[111]

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[105] CAFA § 1715 "Notifications to appropriate Federal and State official" (b).

[106] *Ibid*.

[107] *Ibid*.

[108] *Ibid*. ("Notifications to appropriate Federal and State official", (d) "Final approval".)

[109] CAFA §1715(f).

[110] CAFA §1332(d)(2).

[111] CAFA §1453.

Finally, CAFA orders the Judicial Conference of the United States to prepare, within twelve months, a report for the House and Senate Judiciary Committees on class action settlements.[112] This report must advise Congress of "(1) the best practices that courts can use to ensure fair settlements; (2) the best practices that courts can use to set attorneys fees at levels reflecting the attorneys' accomplishments and to ensure that class members are primary settlement beneficiaries; and (3) the actions the Conference will take to implement these practices".[113]

II. CLASS ACTION SETTLEMENT PROCESSES

North American class action statutes require that class action settlements be approved by the courts to be rendered effective.[114] Before approving a proposed settlement, judges are directed to examine whether the settlement is fair, reasonable and "in the best interests of all who will be affected by it".[115] This requirement of "fairness, reasonableness and adequacy" is codified in U.S. Federal Rule 23(e), but not in the Canadian

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[112] CAFA Sec. 6.

[113] *Ibid*. For a copy of one such report to the U.S. Senate, Senate Report 109-14, online: http://www.gpo.gov/fdsys/pkg/CRPT-109srpt14/html/CRPT-109srpt14.htm.

[114] See above, footnote 11: e.g. F.R.C.P. 23(e) (U.S. FRCP 23(e) is a mandatory requirement that the class action "should not be dismissed or compromised without the approval of the court."); s.29 Ont. C.P.A.; Art. 1025 Que. C.C.P.; Rule 334.29(1) Can. F.C.R. On the need for court review and approval of class settlements, see e.g. *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1125 (9th Cir. 2002) ["*Knisley*"] (the need for judicial review is justified by the possibility that "class counsel may collude with the defendants, tacitly reducing the overall settlement in return for a higher attorney fee"); Chamblee, *supra* note 31 at 159; Lazos, *supra* note 5 at 316-325.

[115] *Ibid*. Also see e.g. *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) ["*Grunin*"], *Zopf v. Burger*, 2010 ONSC 30000 ["*Zopf*"] at para. 48.

statutes, such that Canadian courts have had to develop a similar standard for the judicial oversight of class action settlements.[116]

Reviewing courts will generally be concerned with "safeguarding the interests of the absent class members through an analysis of the fairness and reasonableness of the settlement as it relates to those interests."[117] They will either approve or deny proposed settlements, without modifications or formal amendments.[118] In practice, nonetheless, judges frequently approve settlements after having suggested changes to the proposed agreement. As aptly explained by Judith Resnik:

> [...] we also know that the judge – under contemporary practice – is not the disengaged arbiter coming fresh to the question of the quality of the outcome. Rather, the judge is too often a participant in framing both the conditions under which negotiations have occurred and sometimes proposing terms for the settlement itself. Cases refer to judges who, when reviewing settlements,

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[116] See notably (and principally) *Dabbs No. 1, supra* note 11 at para.10ff.

[117] *McCarthy v. Can. Red Cross Soc.*, [2001] O.J. No. 2474, at para. 16 (Ont. S.C.J.) ["*McCarthy*"]; *Endean v. Can. Red Cross Society*, [2000] 69 B.C.L.R. (3d) 350 (Sup.Ct.) ["*Endean*"].

[118] See e.g. in the U.S., *Hanlon v. Chrysler Corp.*, 150 F.3d. 1011 at 1026 (9th Cir. 1998) ["*Hanlon*"] ("The settlement must stand or fall in its entirety."); *Jeff D. v. Andrus*, 888 F.2d. 617 at 622 (9th Cir. 1989); and in Canada, *Sawatzky v. Soc. Chirurgicale Instrumentarium Inc.* (1999), 71 BCLR (3d) 51 at para. 20 (S.C.); *Dabbs No. 1*, *supra* note 11 at para. 10.

> 'suggest modifications' that become part of a settlement subsequently approved.[119]

In this subsection, I critically discuss the positive law applicable to the settlement review and approval process, and propose reform principles aimed at providing a better protection to class members and fairer outcomes in class action settlements. More specifically, I address the types of settlements, the evidence and materials required to support a settlement fairness determination, the settlement approval hearings, the consequences of approval, and the right to appeal from a class action settlement approval decision. I then end the chapter with reform hypotheses applicable to settlement reviews and approvals.

a. **Types of Class Action Settlements**

Settlements in class proceedings can be of varied types and occur at different moments or stages in the proceedings. Settlements may be concluded by and between an individual plaintiff – usually the representative – and the defendant(s), before certification, or even before the filing of the action. They may also occur at that same stage by and between the representative and other potential members of the class (but not all of these members) and the defendant(s). There may be settlement classes. These kinds of settlements must be approved in Quebec and Ontario (at least statutorily), while B.C. and U.S. Federal courts will permit such individual settlements without court intervention (except under CAFA)[120].

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[119] Resnik, "Litigating and Settling", *supra* note 36 at 855.

[120] See discussion of CAFA, above, footnote 85 and ff.

Settlements may also be concluded later, between the time of the action's filing and the hearing on certification. The certification and settlement approval hearings will then be joined. At that stage, potential class members who are not interested in participating in the class action will be able to opt out of the proceedings, and accordingly, of the settlement as well.

Finally, settlements can occur once the class action is certified. In that instance, and as a general rule, the delay to opt out will have expired (except in one specific case discussed above under U.S. Federal law), and all class members will be bound by the outcome of the class action. In fact, while only the U.S. Federal Rule officially provides for a specifically applicable second opt out right, this right of voluntarily exclusion from proposed settlements should generally be afforded to class members, as will be further discussed in the recommendations for reform.

There are, in fact, endless possibilities in the kinds of class action settlements that may be concluded, and especially the kinds of provisions that may be included therein. Because many class actions are filed principally to protect the rights of the class pending settlement of parallel class litigation in neighbouring states, provinces or countries, these actions – and their settlements – will often cross jurisdictional boundaries such as to create an array of interesting conflicts of laws issues left unaddressed, by choice, in this thesis.

A word must be said, however, about the basic contents and provisions of the typical class action settlement. Class action settlements generally provide a settlement fund, out of which individual plaintiffs will be compensated, or alternatively, a mechanism which will compensate class

members upon the satisfaction of certain conditions.[121] The first option of creating a settlement fund may be more difficult to fulfill as the total number of class members and extent of damages is often hard to evaluate before distribution.[122]

On the other hand, "futures settlement funds" may also be established to compensate claimants who have not yet suffered harm at the date of settlement, but could be "at risk of developing a compensable condition in the future".[123] *Cy près* distributions may also be established, to not-for-profit entities rather than class members, especially in cases where it is hard to identify potential claimants or where each class member will be minimally compensated in the proposed settlement (and it would be uneconomical to provide a distribution).[124] Hence, the expression "*cy près*" has commonly referred to the court's jurisdiction to award settlement funds to a party or entity other than a class member.[125]

Interestingly, the issue of *cy près* distributions in class proceedings was considered by the Ontario Law Reform Commission in its *Report on Class Actions*.[126] The Committee asked whether deterrence was a sufficiently

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[121] See Michael A. Eizenga et al., *Class Actions Law and Practice*, 2d ed., looseleaf (Markham, Ont.: LexisNexis Canada, 2008-) at para. 9.9.

[122] *Ibid*.

[123] *Ibid* at para. 9.16.

[124] *Ibid* at para. 9.19, citing *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont.S.C.).

[125] Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials,* 6th ed. (Toronto: Thomson Carswell, 2004) at 409: "The *cy près* jurisdiction […] arises when the trust's creator has defined specific charitable purposes, but those purposes are impracticable or impossible to carry out.").

[126] Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) [the "OLRC Report"]. Also see Ontario, Attorney General's Advisory Committee on Class Action Reform, *Report* (Toronto: The Committee, 1990).

important objective to stand alone, without ties to individual redress, recommending that

> [w]here it has proved impossible to distribute all or an aggregate award to individual class members, the court should be able to order that any residue be applied in a manner that may reasonably be expected to benefit some or all of the members of the class. […] a provision should be adopted expressly authorizing forfeit distributions where an aggregate award cannot be applied for the immediate benefit of class members.[127]

Ontario law now provides that the court has broad discretion to make *cy près* distributions, and accordingly, to order that an entire settlement fund be applied *cy près*.[128] It is thus common practice in Ontario and the rest of North America to provide some form of *cy près* distribution in class action settlements.[129] The most common way to provide a *cy près* award is to apply a remaining residue, following a claims process, to a chosen, specific charity, to prevent a reversion of the funds to the defendants.[130] Another way to provide such a distribution is to divide the funds in part to class

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[127] *Ibid* at pp. 581 and 595.

[128] See e.g. ss. 24 and 26 Ont. C.P.A.

[129] Anthony Guindon & Kirk Baert, "*Cy près* Distributions and Deterrence"(presented at the Osgoode Symposium on Class Actions, Toronto, 19 April 2010) at 8 [unpublished]. The authors evaluate that 28 *cy près* awards were made in Canada in the last few years.

[130] See e.g. *Bilodeau v. Maple Leaf Foods*, [2009] O.J. No. 1006 at para. 28 (Ont. Sup.Ct.).

members, in part to charities.[131] A more controversial way of distributing *cy près* is to apply the entire settlement fund to *cy près*.[132]

Importantly, *cy près* distributions have recently been questioned by scholars as they create possible "ethical and conflict of interest problems for judges, defendants, plaintiffs and absent class members".[133] Indeed, one such ethical problem is the fact that *cy près* distributions do not properly or directly compensate class members.[134] These criticisms will most certainly lead to more discussion and suggestions for reform in a near future.

Finally, partial settlements are sometimes reached in the U.S. and Canada, which involve only a portion of the class members. These settlements must also be approved by the courts to be made effective.[135] In *Lau v. Bayview Landmark Inc.*, for instance, the Ontario Supreme Court recognized that partial settlements may be beneficial where global settlements are not feasible: "Partial settlement can well result in shortened, less expensive trials and may well be the precursor to a full settlement."[136]

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[131] See e.g. *Cassano v. T.D. Bank*, [2009] O.J. No. 2922 (Sup.Ct. J.).

[132] See e.g. *Walker v. Union Gas Ltd.*, [2009] O.J. No. 536 (Ont.S.C.).

[133] U.S. Chamber Institute for Legal Reform, "Cy près a not so Charitable Contribution to Class Action Practice" (October 2010), online: http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/cypres.pdf, at 2.

[134] *Ibid* at 11.

[135] See e.g. for Canadian caselaw references: *Gariepy v. Shell Oil* Co., [2002] O.J. No. 4022 (S.C.J.); *Harrington v. Dow Corning* (1999), 29 C.P.C. (4th) 14 (B.C.S.C.); *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.). U.S. caselaw references: *In re Linerboard Antitrust Litigation,* 292 F. Supp. 2d 631, 643 (ED. Pa. 2003); *In re Corrugated Container,* 1981 WL 2093 at 19 (S.D. Tex. June 4, 1981); and following case: *Re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981) ["*Re Corrugated*"].

[136] *Lau v. Bayview Landmark Inc.*, [2006] O.J. No. 600 (S.C.J.) at para. 21.

Settlement of a class action is intended to create finality for the parties, mostly the defendant(s). Accordingly, when one (or more) non-settling defendant(s) remain(s) in the class action, the settling defendant(s) stay(s) exposed to the possibility that it will be sued as third party by the non-settling defendant(s). To reduce the risk that the settling defendant(s) may be made liable in the future with respect to the subject matter of the litigation, a "bar order" may be issued.[137] In all the focus jurisdictions except Quebec, courts are permitted to issue such an order preventing the remaining, non-settling defendant(s) from bringing the settling defendant(s) back into the litigation.[138]

b. Evidence and Materials Supporting the Proposed Settlement's Fairness

i. Burden of Proof of Settlement Fairness

The settling parties carry the burden of demonstrating, through their attorneys, that the proposed settlement is fair, reasonable and adequate and that it should be approved.[139] "Positive evidence" is required,

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[137] The bar orders originate from U.S. law: *Nelson v. Bennett*, 662 F. Supp. 1324 (E.D.Cal. 1987) (U.S. Dist. Ct.) ("Under the provisions of such ["settlement bar statutes"], a partial settlement will, in specified instances, operate so as to bar the non-settling defendants from asserting cross claims for contribution against the settling defendant. A defendant contemplating settlement with a plaintiff is thereby granted assurance that, so long as the requirements of the settlement bar statute are satisfied, it may fully 'buy its peace' through such a settlement.")

[138] *Abdulrahim v. Air France*, 2010 ONCA 403 (where bar order was found appropriate); and also *Millard v. North George Capital Management Ltd.*, [2000] O.J. No. 1535 (Sup.Ct.J.), leave to appeal to Div. Ct. dismissed [2000] O.J. 2308. Quebec courts have refused to issue bar orders: see *Roy c. Cadbury Adams Canada inc.*, 2010 QCCS 4453 at para. 52 ["*Roy*"], and *Johnson v. Bayer*, 2008 QCCS 4957.

[139] See *Grinnell*, *supra* note 12 at 463; *Vitapharm Canada Ltd. v. F Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118, 74 O.R. (3d) 758 at para. 141 (S.C.) [*Vitapharm*]; *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 at para. 39 (Sup.Ct.J.) [*Epstein*]; *Dabbs No. 1*, *supra* note 11 at para. 7. Also see e.g. Manual, *supra* note 12 at para. 21.631-34, at 318-22 (2004) (which notably describes the "fairness hearing").

explaining how the settlement is reasonable.[140] This evidence and material information are filed with the motion to approve the proposed settlement.

Pursuant to U.S. Federal Rule 23(e)(3), the parties are required to disclose not just their proposed agreement to settle, but "any agreement made in connection with the proposal [to settle]".[141] In Canada, this disclosure requirement was made much broader and inclusive by the Ontario Court of Justice in *McCarthy v. Canadian Red Cross Society*.[142] In that case, Winkler J. explained that the settling parties have a duty of candour in disclosing all "material information" to the Court:

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[140] Ward K. Branch, *Class Actions in Canada*, looseleaf (consulted on October 15, 2010), (Aurora, B.C.: Canada Law book, 1996-…). In fact, in *Dabbs No. 1, supra* note 11 at paras. 15, 16, the court held that sufficient evidence must be presented before the court to permit an "objective assessment" of the reasonableness of the settlement. For an example of a case where the Ontario Superior Court of Justice found that it had "insufficient evidence" to determine the quantum of recovery for injuries or to reasonably evaluate damages on an aggregate basis, see *Healey v. Lakeridge Health Corp*. [2010] O.J. No. 417 at paras. 290ff. In that case, Justice Perell was interestingly presented with data about the amounts of compensation awarded in several previous class action settlement approvals, in similar cases.

[141] F.R.C.P. 23(e)(3). The Manual, *supra* note 12, interestingly provides that, at para. 21.631:

> Separate side agreements or understandings may encompass such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, division of fees among counsel, or restrictions on counsel's ability to bring related actions in the future. The reference to agreements or undertakings related to the proposed settlement is necessarily openended.
>
> It is intended to reach agreements that accompany settlement but are not reflected in formal settlement documents and, perhaps, not even reduced to writing. The spirit of Rule 23(e)(2) is to compel identification of any agreement or understanding that might have affected the interests of class members by altering what they may be receiving or foregoing. Side agreements might indicate, for example, that the settlement is not reasonable because they may reveal additional funds that might have been paid to the class that are instead paid to selected claimants or their attorneys.

[142] *McCarthy*, *supra* note 117 at paras. 19-21.

> […] *there is a positive obligation on all parties and their counsel* to provide a *full and frank disclosure of all material information* to the Court. This is a well developed principle of law in respect of *ex parte* motions for injunctive relief but the underlying concerns it addresses are equally applicable in the context of unopposed motions in class proceedings or on motions where there is the appearance of a risk of collusion among the parties. [italics added][143]

The precise extent of this disclosure requirement has yet to be defined by the courts, but I interpret it as requiring complete disclosure of any and all *materially important* information relative to the agreement's negotiation and conclusion, as well as specific provisions, including disclosure of any and all information about the points of interest for each of the parties, difficulties encountered in the negotiations, weaker points or disadvantages for some of the parties in the settlement (to the extent that this information is not privileged), or of issues that may arise later or become important later in the proceedings or at the settlement's implementation stage. I further interpret this duty as specifically requiring disclosure of information that cannot appear from a careful reading of the settlement agreement. For example, the parties would need to disclose the

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[143] *McCarthy*, *ibid* at paras. 19-21 (certification and settlement approval). Also see *Verna Doucette v. Eastern Regional Integrated Health Authority*, [2010] N.J. No. 46 (Newf'ld. and Lab. Supreme Ct.).

essence of heated pre-settlement discussions between the parties regarding one controversial provision of the agreement.

ii. **Materials Supporting the Proof of Settlement Fairness**

The target jurisdictions' class action statutes are generally silent in respect of the precise materials required to be submitted with the motion for approval (other than F.R.C.P. 23(e)(3) and certain requirements of disclosure to the Quebec *Fonds d'aide aux recours collectifs*). The caselaw has provided that there must be ample evidence to allow reviewing judges to decide with more than "mere conjecture".[144] In addition, the court may insist on having sufficient evidence to "exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances."[145] This evidence must generally be both physical and oral, comprised of documents such as affidavits, written pleadings and exhibits, as well as testimonies, of the negotiating parties, experts, objectors, third parties or others, as required.[146]

Upon agreeing on the terms of a proposed settlement, parties and counsel will usually prepare and submit a joint stipulation of settlement, which is a proposed settlement document outlining the terms, amount and form of compensation, and the effective date of settlement.[147] This stipulation

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[144] *Ontario New Home*, *supra* note 135.

[145] *Dabbs No.1*, *supra* note 11.

[146] *Manual*, *supra* note 12 at 319-320.

[147] In fact, the stipulation must include, in detail: : (1) the timing of distribution, (2) the release between defendants and the class (and, if appropriate, between the various defendants); (3) the payment of notice costs; (4) opt-out and proof of claim procedures including "blow" provisions applicable where there are excessive opt-outs; (5) attorneys' fees; (6) confidentiality provisions; (7) choice of law and choice of forum clauses; (8) "no-admission" clauses; (9) contribution and indemnity provisions; (10) administration of the settlement funds; and (11) provisions concerning drafting and execution of any ancillary

serves to preliminarily evaluate the fairness of settlement,[148] and may lead judges to request from the parties and counsel additional information relevant to evaluating the proposed settlement.[149]

Affidavit evidence is also usually presented by both of the settling parties, to support an explanation of the reasons for settling and objectives of the settlement, and in which the chances of success on the merits are evaluated and explained.[150] The oral pleadings will seek to explain how the settlement compensation will be distributed to class members, how much will be paid in costs and counsel fees, and how the balance of the moneys will be distributed.[151]

In settlements that occur before certification, the defendant will usually consent to "certification for the purposes of settlement only", and as an explicit term to the settlement. The motion to approve the proposed settlement will then be heard at the same time as the motion for

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pleadings or documentation. See *Newberg on Class Actions*, *supra* note 35 at para. 11.24. For an example of such a stipulation of settlement in the Canadian Nortel Class Action Settlement, see: http://www.nortelsecuritieslitigation.com/court_en1.php3.

[148] Kent A. Lambert, "Class Action Settlements in Louisiana" (2000-01) 61 La. L. Rev. 89 at 94. Lambert adds that the parties commonly supplement the stipulation with memoranda and supporting affidavits that discuss the background for the proposed settlement, the substantive merits of the case and any significant procedural hurdles. These memoranda and affidavits also outline why the proposed settlement is fair, reasonable and appropriate to all class members.

[149] *Manual*, *supra* note 12 at 320.

[150] Branch, *supra* note 140 at para. 16.29.

[151] In Quebec, the practice rules of the Superior Court require that the settlement agreement provide how much funds will be reimbursed to the *Fonds d'aide aux recours collectifs*, a provincial funding agency which helps representatives seek compensation through the class action vehicle, and that the motion to approve the proposed settlement be formally served on the *Fonds*: rules 63 and 65 Qc. R.p.c. The Ontario equivalent is O.Reg. 771/92, s. 8.

certification.[152] When a settlement is concluded at the certification stage, however, and the settlement is submitted for approval at the same time as presentation of the motion to certify the class action, questions arise as to whether it is proper to accept a looser certification standard to consider the fact of settlement. Put differently, in settlement classes, can and should the settlement context affect the determination of appropriateness of the class action for certification purposes?

Indeed, the U.S. Supreme Court in *Georgine v. Amchem Prods. Inc*.[153] has held that while the fact of settlement is important, given that it avoids trial manageability issues that would have arisen otherwise, it is essential to ensure that all the procedural certification requirements of Rule 23 are properly met before judicial approval of a settlement is given.[154] Accordingly, in evaluating the required criteria for certification pursuant to Rule 23(b)(3), notably, predominance and superiority, the existence of a proposed settlement will be ignored.[155]

In common law Canada, the *Haney Iron Works* case suggests a different approach in the face of a pending settlement, favouring a more lenient

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[152] See e.g. *Dabbs No. 1*, *supra* note 11.

[153] *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610 (3d Cir. 1996), aff'd 117 S. Ct. 2231 (1997) (S.C.C.) ["*Amchem*"].

[154] *Ibid*. The Supreme Court confirmed the Third Circuit ruling that prohibited taking settlements into consideration when deciding whether to certify settlement classes.

[155] Note, "Civil Procedure. Class Actions. Third Circuit Prohibits Taking Settlements into Account When Deciding Whether to Certify Settlement Classes. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), Cert. Granted Sub Nom. *Amchem Products, Inc. v. Windsor*, 65 U. S. L. W. 3338 (U. S. Nov. 1, 1996) (No. 96-270)" (1996) 110:2 Harv. L. Rev. 529.

certification inquiry in light of this consideration.[156] The case must be certifiable "*prima facie*" before settlement fairness is evaluated and approval is granted.[157] Accordingly, the standard for certification at the time of settlement is similar to the usual certification standard, but it is "less rigorously applied".[158]

Curiously, certain Ontario courts have chosen to apply a double standard of certification that will depend on context. Indeed, in a series of Ontario "vanishing premiums" life insurance cases, certification was granted in a settlement context, and deemed inappropriate in a litigation context.[159] These courts have considered that "denial of certification in a litigation context is not an impediment to certification in a settlement context",[160] a view that assumes that settlement is to be favoured in the larger scheme of the litigation. Questionably, this position also accepts that the class action vehicle may be used primarily to settle cases and buy peace in exchange for compensation.

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[156] *Haney*, *supra* note 18. Interestingly, in *Dabbs No. 1*, the Court certified a settlement class without considering the impact of settlement on certification. See *supra* note 11.

[157] *Ibid* at para. 16. *See also* on that same issue, Mulheron, *supra* note 38 at 395.

[158] *Bellaire v. Daya*, [2007] O.J. No. 4819 (Sup.Ct.). ["*Bellaire*"]. Also see *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 5132, at para. 10 ("Where certification is sought for the purposes of settlement, all the criteria for certification must still be met. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements [...] In the context of the proposed settlement, I am satisfied that the preferable procedure criterion of s. 5 (1)(d) of the Act has now been satisfied. The existence of settlement changes the nature of the preferable procedure analysis.") Interestingly, Alberta's recent Bill 20, *supra* note 66 provides that in multi-jurisdictional certifications, "(5) […] where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement."

[159] Eizenga & al., *supra* note 121 at paras. 9.23-9.25.

[160] *Ibid*, para. 9.23.

Still on the issue of settlement classes and certification standards, the Quebec Superior Court has recently held that the standard required for "authorization" of a class action remains the same whether the evaluation is made for settlement purposes or not. On that point, Justice André Prévost explained [translation by author]:

> The criteria of 1003 C.P.C. are no different, at the authorization stage, whether they are associated to a proposed settlement or not [...] There is only one form of authorization of a class action which applies uniformily to all situations giving rise to a class action.[161]

Accordingly, contrary to the Canadian common law courts, Quebec courts require the same level of scrutiny whether certification is sought simultaneously to settlement approval, or instead, once the case has already been certified. Of course, this Quebec policy does not properly encourage the parties to settle. Instead, it sends a clear message that class actions cannot be filed strictly for the purposes of reaching a group deal; each certification criterion must be carefully scrutinized, and the action will only be "authorized" to go forward as a class action if each and every Article 1003 C.P.C. criterion is met.

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[161] *Demers v. Johnson & Johnson Corp.*, 2009 QCCS 4885, paras. 29-31. For identical standpoint on the issue see *Richer c. Banque Nationale du Canada*, 2010 QCCS 2142, at paras. 12-14.

c. Class Action Settlement Hearings

i. Preliminary Hearing

North American laws vary regarding the number of hearings required to be held to evaluate settlement fairness, the objectives of these hearings and the process to be followed at this occasion. In Canada, the class action statutes do not indicate whether one or more hearings are required to evaluate and decide the fairness of proposed settlements. The practice, however, is for courts to hold one official fairness hearing, and prior telephone conferences, hearings or meetings with counsel to discuss the proposed agreement, as will be further discussed in Chapter IV. Canadian judges will generally either formally approve the settlement at a preliminary stage, or refrain from commenting on it until objections have been heard.[162] They may, however, flag "areas of concern" about the proposed settlement at a preliminary hearing, and require that these concerns be addressed in a final settlement agreement.[163] Holding one final fairness hearing is nonetheless mandatory.[164]

In the United States, proposed class action settlements are reviewed at two distinct stages.[165] A first hearing is held, where settlement fairness is preliminarily evaluated. The court then decides whether to require that notice of settlement be sent to class members and whether to hold another settlement fairness hearing, with the support of evidence presented to that

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[162] *Defending Class Actions in Canada*, *supra* note 14 at 142.

[163] *Ibid* at 146. See also *Parsons v. Can. Red Cross Society*, [1999] O.J. no. 3572 at 132 (Sup. Ct.) ["*Parsons*"].

[164] *Killough*, *supra* note 11.

[165] *Manual*, *supra* note 12 at para. 21.632. Also see *Newberg on Class Actions*, *supra* note 35.

effect. Court experts or special masters may then be appointed to review the settlement terms, assemble information relevant to understanding how the settlement affects the class members, and generally assist the judge in the fairness determination.[166]

Accordingly, this first hearing serves to better inform the court about the context which gave rise to the proposed settlement, including the extent and content of the negotiations by and between the parties and counsel, and it gives counsel a chance to explain the settlement's contents and terms.[167] The settlement judge may discuss areas of concern and ask counsel "hard questions about the settlement's value to the class".[168] Amendments to the proposed agreement may also be suggested, especially when there are "hot button indicators" which suggest unfairness of the settlement.[169] The following are examples of such indicators, as reproduced from the *Manual for Complex Litigation 4th*:

> - Granting class members illusory non-monetary benefits, such as discount coupons for more of the defendants' product, while granting substantial monetary attorney fee awards[170];

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[166] *Ibid*.

[167] Lambert, *supra* note 148 at 94. A notice of preliminary hearing need not be sent to absent class members, which minimizes the burden on the parties.

[168] Barbara J. Rothstein & Thomas E. Willging, "Managing Class Action Litigation: A Pocket Guide for Judges", 2d ed. (Washington: Federal Judicial Center, 2009) at 27 ["*Pocket Guide*"].

[169] *Ibid* at 15f. and 27.

[170] See e.g. *In re Gen. Motors, supra* note 98 (where the Court vacated the order certifying the provisional class and approving the settlement, thereby rejecting the settlement as "unfair" because the compensation in form of coupons was unfair.) In coupon

- Imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the funds will revert to the defendants;

- Treating similarly situated class members differently (for example, by settling objectors' claims at significant higher rates than class members' claims); …

- Releasing claims of parties who received no compensation in the settlement;

- Setting attorney fee based on a very high value ascribed to non-monetary relief awarded to the class, such as medical monitoring injunctions or coupons, or calculating the fee based on the allocated settlement funds; rather than the funds actually claimed by and distributed to class members; and

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settlements, the coupons afford class members the right to purchase additional goods or services from the defendants at a reduced price. Deterrence is then low or non-existent. Another interesting example of a clearly abusive settlement is the recent October 2010 Breyer Ice Cream Settlement, a copy of which is online: http://www.consumerclassactionsmasstorts.com/uploads/file/11915168274.pdf, which is pending for approval. This settlement provides nothing for the class members, when class counsel seek $200,000 in attorney fees!

- Assessing class members for attorney fees in excess of the amount of damages awarded to each individual.[171]

This list, in fact, enumerates *prima facie* problematic situations that suggest abuse by the settling parties, or class actions filings made for improper purposes. The settlement approval process is, indeed, marked with a serious potential for abuse.[172] Other than the situations listed above, there may also be instances of "reverse auctions", where the defendants compete to obtain the business of a certain lawyer acting in a parallel class action, and eventually contract with the one lawyer who will accept the "lowest recovery for the class" (often in exchange of generous attorney fees).[173] This will be the case where, notably, a "settlement [is sold] to the lowest bidder among counsel for competing or overlapping classes."[174]

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[171] *Manual*, *supra* note 12 at 309-311. There is one example of this practice of requiring class members to pay legal fees in excess of the amount of damages awarded in the *Manual, supra* note 12: *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1349 (7th Cir. 1996) (where class members had each received a compensation of $2.19, but $91.33 was simultaneously deducted from their bank account to pay for attorney fees!). Another example is provided by Kahan and Silberman in Marcel Kahan & Linda Silberman, "The Inadequate Search for 'Adequacy' in Class Actions: A Critique of *Epstein v. MCA, Inc*." (1998) 73 N.Y.U. L. Rev. 765 at 785-86 (where they explain that in one such settlement, class members individually recovered $4.38 but were charged $80.00 toward attorney fees).

[172] The *Manual, ibid*, lists a number of potential abuses at pages 310-12. Also see M. Moller, "The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform" (2005) 28 Harv. J. of L. and Public Pol. 855; Arthur Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality and the 'Class Action Problem'" (1979) 92 Harv. L. Rev. 664 ["Miller, Frankenstein Monsters"].

[173] See e.g. *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F. 3d. 877, 882 (7th Cir. 2000) (where the circuit court rejected the proposed settlement because "Crawford and his attorney were paid handsomely to go away; the other class members received nothing").

[174] *Pocket Guide*, *supra* note 168 at 14.

Two landmark U.S. Supreme Court decisions approving class action settlements have highlighted some of these difficulties and abuses.[175] In *Amchem Products Inc.* v. *George Windsor*, the U.S. Supreme Court confirmed a decision which had overturned a class action settlement of present and future claims, and involving asbestos victims. In the *Amchem* class action, the settling parties filed the same day a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.[176] In addition, the settlement concerned a combination of future claims and claimants, with potentially inadequate funding.[177] Ultimately, the settlement failed because, notably, it featured inadequate representation of the class members, and potential intra-class conflicts.[178]

One can imagine many other such situations that may more subtly suggest insufficient information or inadequate representation of class members. In these instances, corrections may be suggested by the judge, and once they are made, an independent review by a special master or other counsel to the court can still be requested.[179] If no changes are made to the proposed agreement, the judge may refuse to approve the settlement.

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[175] *Amchem, supra* note 153 (in the S.C.C.) and *Ortiz* v. *Fibreboard Corp.,* 527 U.S. 815 (1999).

[176] *Ibid* at 2239.

[177] *Ibid* at 2251-52.

[178] *Ibid*.

[179] *Manual*, *supra* note 12 at 21.632 (this is especially the case if there are "reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys. The parties then have an opportunity to resume negotiations in an effort to remove potential obstacles to court approval.")

ii. Notices of Settlement and Hearing, Objections and Opt-Outs

The North American class actions laws vary regarding the notices of settlement and fairness hearing. These laws all require that notice of certification be sent, but do they also require that notice be issued informing the members of the settlement and impending date and place of the fairness hearing? How about a third notice informing the members of the settlement approval, of the settlement terms, and of the procedure required to claim compensation?

Under U.S. federal law, class members must be notified of the impending formal fairness hearing. In fact, "direct notice [must be sent] in a reasonable manner to all class members who would be bound by the proposal"[180], as required by the Due Process Clause.[181] The notice "summarize[s] the litigation and the settlement and '[apprises] class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation'", and informs absent members that they may appear, be heard and/or object at the

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[180] FRCP 23(e)(1). Rule 23 contains two notice provisions. The first is Rule 23(c)(2)(B): "[f]For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). The second is the settlement notice, codified in 23(e)(1).

[181] *Fidel v. Farley*, 534 F.3d 508 at 513 (6th Cir. 2008) ["*Fidel*"].

fairness hearing.[182] It must be "reasonably calculated to reach interested parties", but does not need to be sent individually.[183]

Quebec's Article 1025 C.P.C. similarly requires that a notice of settlement and settlement hearing obligatorily be sent:

> 1025. Transaction, [...] is valid only if approved by the court.
>
> *This approval cannot be given unless a notice has been given to the members.*
>
> The notice must state
>
> *(a)* that the transaction will be submitted to the court for approval, specifying the date and place of such proceeding;
>
> *(b)* the nature of the transaction and the method of execution;
>
> *(c)* the procedure to be followed by the members to prove their claims; and
>
> *(d)* that the members have the right to present their arguments to the court as regards the transaction and the

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[182] *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 177 FRD 216 at 230 (DNJ 1997) at 327 (the notice "must inform the class of the nature of the pending litigation, the general terms of the settlement, that complete information is available from the court files, and that any class member may appear and be heard at the fairness hearing."). Also see *Manual*, *supra* note 12 at para. 21.633.

[183] *Re Prudential, ibid* at 514.

> distribution of any balance remaining.
> [...][184] [italics added]

Article 1030 C.P.C. further requires that when a judgment is rendered approving the proposed settlement, another notice be sent such as to inform the members of the nature of the settlement and claims procedure.[185]

In the Canadian common law provinces, issuance of a notice of settlement and fairness hearing (entitled a "notice of proposed settlement and fairness hearing") and of a notice of settlement approval decision has traditionally been left to the court's discretion.[186] Notice of settlement is reserved to cases where "the court considers it necessary to protect the interests of a class member or party, or to ensure the fair conduct of the proceeding".[187] Accordingly, when courts order that notices of settlement be sent to unnamed class members, it is, arguably, because they believe that class members' interests must be protected to ensure the fair conduct

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[184] Art. 1025 C.P.C. (Quebec). Also see Rule 47 Qc. R.p.c.: Règle 65 : "Approbation de transaction**.** La requête qui demande l'approbation d'une transaction intervenue hors cour est signifiée au Fonds, avec avis de sa présentation."

[185] Also see Duval-Hesler, *supra* note 63 at 403 (where she states: [translation by author] "[i]n light of the provisions of the *Quebec Code of Civil Procedure*, it seems that a second notice of the settlement approval decision is required."). In fact, Quebec courts can always require additional notices, when necessary to preserve class members' rights, pursuant to Art. 1045 C.P.C.

[186] See e.g. Ont. C.P.A., s. 29(4), Nfwld C.A.A., s. 35(5) and B.C. C.P.A. s. 35(5) where issuance of notice is specifically made discretionary.

[187] See e.g. s. 29(4) Ont. C.P.A., which provides that in approving a settlement "the court shall consider whether notice should be given under section 19" and what that notice should include. Section 19(1) provides that "[a]t any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding."

of the proceedings. Correspondingly, publishing the notice makes the settlement approval process at least somewhat fairer.[188]

Certain common law courts have held that since notice is optional under the Acts, it should not be required by the courts.[189] In *Kranjcec v. Ontario*, a settlement was approved even though certain class members had not properly been notified of the settlement fairness hearing.[190] The court explained that

> [n]otice of a fairness hearing is not obligatory under the CPA, and although it is invariably ordered, it is a safe assumption that the notice that was given reached far more class members than is usually the case with a class of this size. Insofar as the purpose of notice is, for the most part, to permit the court to hear concerns that the members might have about the settlement, and the fees of class counsel, there is no reason to believe that the representatives of the estates that had been excluded from the mailing would wish to raise objections, or make submissions, that would not be shared

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[188] Only a few Canadian courts, however, have recognized this purpose of the notice factor. See *Reid v. Ford Motor Co.*, [2006] B.C.J. No. 2182 at para 34 (S.C.) at para. 11 ["*Reid*"]. See also *Fontaine v. Canada (Att.Gen.)*, [2006] Y.J. No. 130 at para. 41 (S.C.) ["*Fontaine*"].

[189] *Jones v. American Heyer-Schulte Corp.*, [1998] O.S. No. 6293 (Ont. Gen. Div.).

[190] *Kranjcec v. Ontario* (2006), 57 C.C.P.B. 306 (Ont. Sup.Ct.J.).

> with the approximately 47,000 members who received notice.[191]

When a notice is provided, the courts must approve its contents and be satisfied that it will be effective in reaching the largest number of class members possible, whatever the means of communication used.[192] They will focus their inquiry on whether the interests of absent class members have been adequately provided for.[193] Although using the Web is a great way to disseminate information about the status of the members' claims and administration of the settlement,[194] there are many other effective ways to do so, such as mailings, newspapers or trade journals.

With the recent Supreme Court decision in *Canada Post Corp v. Lépine*[195], notice has become a mandatory requirement at the certification stage and in the event of settlement. The Supreme Court of Canada qualified notices as "indispensable" to inform class members

> about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — in particular the possibility of opting out of the class action — they have under

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[191] *Ibid* at para. 2.

[192] See e.g. ss. 17-20, 23 and 29(4) Ont. C.P.A.

[193] Eizenga & al., *supra* note 121 at para. 9.51.

[194] For example, in the YBM case discussed above in the thesis' introduction, a website was set up, www.ybmclassaction.com, which included copies of the proceedings and judicial orders, and information about the proof of claim process.

[195] *Canada Post Corp. v. Lépine*, [2009] 1 S.C.R. 549 at 42 ["*Lépine*"].

> the judgment, and sometimes, as here, about a settlement in the case.[196]

My view is that *Lépine* underscores the importance of informing class members of the hearings, of their rights, and of developments in the class action litigation that impact these rights.

In fact, one must underscore that notice is also important because it better informs class members of the possibility of officially objecting to the settlement. Objections can be filed, after issuance of the notice of settlement, and within the delay to object specified in the proposed settlement. These objections will be reviewed by the court as it evaluates settlement fairness. In Canada, the process followed for filing objections is not regulated, but is, instead, dictated by practice, as was explained in *McCarthy v. Can. Red Cross*[197]:

> Although the C.P.A. does not expressly provide a process for receiving objections by class members, there is now a well-established practice of combining the settlement approval motion with a fairness hearing, on notice to the class, at which time objections to the settlement are routinely received and considered by the court. [...] where the participation is sought simply for the purpose of making an objection to a proposed settlement, and

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[196] *Ibid.*

[197] *McCarthy v. Can. Red Cross*, [2007] O.J. No. 2314 (S.C.J.).

> a process for objections has been otherwise provided, there is no basis for granting a participation order.[198]

Canadian courts generally have not considered objectors to be parties to the action, and have indicated that they, instead, "reflect the non-adversarial settlement approval process."[199] As such, Section 14 of the *Ontario Class Proceedings Act* provides that objectors to a class action are not automatically made parties to the hearing, but that they "may be granted leave to participate in the hearing, in whatever manner and on whatever terms [...] the court considers appropriate."[200]

The U.S. federal court practice reveals a different approach and philosophy to objectors as any class member who chooses not to opt out, that is, any formal "party" to the proposed settlement, will have standing to object to it.[201] Hence, if objections are filed, objectors will generally be allowed to appear and participate at the fairness hearing. Judges may, however, limit the amount of time for the objection, or refuse to hear the

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[198] *McCarthy*, *ibid* at paras. 9 and 11.

[199] Eizenga & al., *supra* note 121 at para. 9.51.

[200] See e.g. s. 15 Ont. C.P.A. Also see s. 16 Alta. C.P.A.; s. 17 B.C.C.P.A. Additional evidence in support of a testimony can also be produced if relevant and timely submitted. See *Dabbs No. 1, supra* note 11 at para. 22.

[201] *Newberg on Class Actions*, *supra* note 35 at para. 11.55, p. 168 ("Any party to the settlement proceeding has standing to object to the proposed settlement"); *Manual, supra* note 12 at para. 21.643. See generally F.R.C.P. 23(e)(5) and 23(c)(2)(B)(iv), which provide the right to object to a proposed settlement and that class members may appear through their attorney. See e.g. *Re Community Bank of Northern Virginia*, 418 F.3d 277 at 316 (3d Cir. 2005) ["*Re Community Bank*"]; *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 at 1558 (3d Cir. 1994) ["*Grimes*"] ("the objecting class members must be given an opportunity to address the court as to the reasons the proposed settlement is unfair or inadequate"). By contrast, Canadian objectors do not have the right "*per se*" to participate in class proceedings, but may be granted leave to participate at the fairness hearing. Eizenga & al., *supra* note 121.

same objection more than once.[202] U.S. federal courts have underscored the importance of objections in providing an "adversarial scrutiny of the proposed certification and settlement terms."[203] Objections made for improper purposes, however, will have little weight in the fairness determination, but strong, appropriate and well-articulated objections may provide the evaluating judge with valuable information about the settlement's fairness or unfairness. Finally, the issue of opt outs may also be considered at the preliminary hearing. Class members will occasionally be afforded a limited, second right of opt out, following the settlement's approval.[204]

Accordingly, these Acts reveal important differences in philosophy regarding objections. The Quebec and American regimes are much more inclusive and permissive as class members are automatically given the right to object at the hearing.

iii. Fairness Hearing

Once the preliminary hearing is held, the settlement's proponents must formally demonstrate that the settlement is fair, reasonable, and adequate at the occasion of one formal hearing: the "fairness hearing". This hearing is made mandatory in the U.S. by Federal Rule 23(e) and in Canada, by the recent caselaw.[205] At the hearing's conclusion, the judge must be satisfied

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[202] *Manual*, *supra* note 12 at para. 21.634.

[203] *Ibid* at para. 22.924. Also see e.g. Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues* (2004) 57:5 Vand. L. Rev. 1529.

[204] Duval-Hesler, *supra* note 63 at 403. In Rule 23(b)(3) classes, class members may be afforded a second right of opt-out.

[205] *Killough v. Can. Red Cross Soc.* (2001), 85 B.C.L.R. (3d) 233, 2001 B.C.S.C. 198 at para. 8 [*Killough*, 2001].

that a "sufficient record as to the basis and justification for the settlement [has been presented, containing] specific findings as to how the settlement meets or fails to meet the statutory requirements".[206] Parties are allowed to present witnesses, experts, affidavits and declarations, and also to appear, present and argue their objections.[207]

Certain Canadian judges choose to hold only one hearing, the formal fairness hearing. In that event, they will often have previously participated in telephone conferences or informal case management meetings, where areas of concern in the proposed documents are discussed,[208] and final approval is made conditional upon the parties agreeing to modify the agreement.[209] Judges may initially refuse to approve proposed settlements, following which refusal the settling parties will re-submit an amended settlement proposal, which may then be approved.[210]

For example, in *McCarthy v. Can. Red Cross Soc.*,[211] the court first rejected the proposed settlement because it believed (1) that a certain subclass was inadequately treated, and (2) that there had been insufficient disclosure of

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[206] *Manual*, *supra* note 12 at para. 21.635.

[207] *Ibid* at para. 21.634.

[208] See e.g. *Quatell v. Canada (Att. Gen.),* [2006] B.C.J. No. 3231 (B.C.S.C.); *Baxter v. Canada (Att. Gen.)* (2006), 83 O.R. (3d) 481 (Sup.Ct.J.) ["*Baxter*"].

[209] *Parsons v. Can. Red Cross Soc.* (2000), 49 OR (3d) 281 (SCJ) at para. 38 ("In order to obtain the approval of this court, modifications were required to the settlement agreement.").

[210] An example of this kind of situation is the case of *Dabbs No. 1*, *supra* note 11.

[211] *McCarthy*, *supra* note 117.

the ability to pay and the strength of the case.[212] Approval was later granted, after modifications were made to the program and greater disclosure was given. Another recent example is the class action case brought against the Montreal private college Selwyn House.[213] In that case, a settlement of a sexual abuse was first rejected because class members were not told of the compensation levels until after they elected to participate in the settlement. The proposed settlement was then modified, re-submitted and approved by the Quebec judge.

In specific instances, such as national or multi-jurisdictional class actions, or other complex class actions, the decision to approve or deny a proposed settlement can be made with the help of others. In multi-jurisdictional cases, the settlement judges from different target jurisdictions may be permitted to consult one another to discuss the fairness of the proposed settlement.[214] In other instances, a "friend of the court" or court-appointed monitor may be asked to intervene and independently work toward evaluating fairness of settlement.[215]

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[212] *Ibid* at para. 11.

[213] *G. (M.) v. Association Selwyn House*, 2008 QCCS 3695 (first settlement hearing – rejected) and 2009 QCCS 989 (second settlement hearing – settlement accepted) ["*Selwyn House*"].

[214] See e.g. *Killough*, *supra* note 11 at paras. 13-14 ("the presiding judges in British Columbia, Alberta, Ontario, and Quebec consulted with respect to the merits of the application heard by each of them, and discussed various aspects of the claims process and the administration of the settlement with which the courts will be involved in the future. Concerns were identified in relation to certain aspects of the proposal for administration, the adequacy of the administration budget, and the process by which disputes between claimants and the administrator with respect to the validity of claims would be resolved."). The qualitative interviews, the results of which will be addressed in Chapter IV, have revealed that this sort of judicial cooperation is appreciated by the judges, who will then have someone to speak to about the settlement and will feel less isolated with the settlement approval decision.

[215] *Killough*, *supra* note 11 at para. 15 (where a monitor was engaged in the settlement discussions to solve some of its problematic provisions.) The YMB Magnex Settlement is an example of a case where a friend of the court was appointed.

To properly and adequately carry out their role and protect the rights of class members, judges evaluate the proposed settlement with care. U.S. federal court judges must sufficiently support their conclusion and reasoning: "use of 'mere boilerplate' language will not suffice."[216] In fact, the burden of proof remains with the settlement proponents, but judges are required to make independent factual findings of fairness based on the case record.[217] In Canada, there is no such requirement of providing detailed reasons for judgment discussing settlement fairness.

In conclusion, court hearings to evaluate the fairness of proposed settlements are mandatory in our four target North American jurisdictions. Practices vary, however, regarding the number of hearings, their uses and objectives, and the processes that are to be followed. In many instances, judges will hold case management meetings or telephone conferences to discuss the organisation of the case and the substance of the proposed settlement. In addition, and as will be further addressed in the subsequent chapters, the degree of acceptance and weight given by judges to testimony and evidence regarding the proposed settlement's fairness will vary, as will the perceptions of the role of the judge asked to evaluate settlement fairness at the hearing.

d. **Consequences of Settlement Approval**

i. Binding Effect

Class action settlements, once approved, bind all class members who have not opted out, even if individual consent to its terms has not been afforded

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[216] *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir., 1974), cert. denied, 419 U.S. 900 (1974), at para. 19.

[217] *Ibid*.

by the members.[218] All parties are constrained to the document as approved, and the courts cannot change the terms of the final, agreed-upon and approved settlement.[219] Claims forms will be submitted by the class members, which will be reviewed by an individual or committee appointed for that purpose. Periodic reports of the distributions, of the allowance and refusal of claims, and of other administrative matters will regularly be given to the court.[220]

Closely related to the binding effect of proposed settlements is the approval's *raison d'être*. Court approvals of proposed class action settlements principally seek to (1) protect the interests of unnamed or absent class members; and (2) prevent any and all forms of abuse, specifically through collusion between the private parties to the

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[218] *Epstein v. MCA, Inc.*, 50 F.3d 644 at 667 (9th Cir. 1995), *overruled on other grounds sub nom Matsushita Elec. Industries Co. Ltd. v. Epstein (1996)*, 516 US 367 (S.C. 873) [*"Epstein v. MCA"*]. Also see F.R.C.P. and provincial class action laws regarding settlement approval, cited above at footnote 40ff. Also see John C. Coffee, Jr., "Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation" (2000) 100 Colum. L.Rev. 370 at 381 ["Coffee, Class Action Accountability"] ("Inevitably, some members of a large class will never receive notice and cannot therefore be assumed to have consented even though they will be bound by the judgment or settlement."). For a perspective that challenges the binding effect of settlements in a collective context, see Samuel Issacharoff and Richard A. Nagareda, "Class Settlements Under Attack" (2007-08) 156 U. Pa. L. Rev. 1649 at 1654 and 1651 (arguing that "the binding effect of a class settlement cannot be resolved simply within our inherited litigation vocabulary" and that instead we must seek "a cohesive framework for establishing the finality of class actions under the real-world conditions of settlement."); Tobias Barrington Wolff, "Preclusion in Class Action Litigation" (2005) 105: 3 Colum. L. Rev. 717; Geoffrey C. Hazard, Jr. et al., "An Historical Analysis of the Binding Effect of Class Suits" (1998) 146 U. Pa. L. Rev. 1849 at 1855 ("If the interests of the class are presented with reasonable competence and vigor, then courts will be on safe ground in treating members of the class as bound even if they did not actually participate in the litigation. This concept is also formulated in various ways, notably as whether the representatives 'fairly and adequately protect the interests of the class' or 'prosecute.")

[219] *Stewart v. Gen. Motors*, (15 Sept. 2009), Court File No. 06-CV-310082PD1 (Ont. Sup.Ct.) at para. 9.

[220] *Manual*, *supra* note 12 at pp. 246-7.

settlement, including counsel.[221] Representative plaintiffs must not be allowed to "use the class action to improve their bargaining position to settle their individual claims on terms more favourable than those of other class members"[222], that is, by seeking "sweetheart settlements."[223] In addition, control must be had over class counsel's inadequate representation in situations where they have clearly benefited from the settlement at their clients' expense.

ii. **Involvement in Administration and Implementation of the Settlement**

What happens after a proposed settlement is approved by the courts? Does approval end the courts' involvement and responsibility to the parties? Must courts actually maintain their careful oversight at the implementation and administration phases of the settlement? Is the courts' function instead exhausted, or *functus officio*?

Because the settlement fairness review mandates due consideration by the judges of whether "satisfactory arrangements" have been made under the settlement agreement to distribute the class members' monetary compensation,[224] it would appear logical that these judges remain

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[221] See *OLRC Report*, *supra* note 126 at 788-89. See also *Knisley, supra* note 114 at 1125 (9th Cir. 2002) (the need for judicial review is justified by the possibility that "class counsel may collude with the defendants, tacitly reducing the overall settlement in return for a higher attorney fee"); *Lachance v. Harrington*, 965 F.Supp. 630 at 645 (E.D.Pa. 1997); Eizenga & al., *supra* note 121 at 141; Chamblee, *supra* note 31 at 159; Lazos, *supra* note 5 at 316-325.

[222] Note, "Risk-Preference Asymmetries in Class Action Litigation" (2005) 119:2 Harv. L. Rev. 587 at 601.

[223] *Ibid*.

[224] See e.g. *Killough*, *supra* note 11 at para.24; *In re Gen. Motors*, *supra* note 98 (in which coupon settlement was rejected).

involved and seized of the case until the settlement is properly administered and implemented. But the reality is different, at least for American judges, because they have discretion when it comes to deciding whether to exercise judicial oversight at the settlement implementation stage. Indeed:

> The extent to which judges police class actions is largely a matter of the individual judge's choice, influenced by traditional views of the attorney-client relationship and settlement as a form of private ordering. Not only will judges not do enough to review settlements, *there is little incentive for continued judicial oversight in the administration phase*. There is no requirement in the Federal Rules for judicial review of settlement administration. Although judges retain jurisdiction over settlements of class actions until administration is complete, *whether the settlement administration will be reviewed or a final report issued is at the discretion of the individual judge or party request*. This lack of uniformity is compounded by incentives for judges to approve settlements and not to maintain

> active oversight over their subsequent administration. [italics added][225]

While Canadian judges have not traditionally felt required to oversee the administration of class action settlements, they have more recently begun to recognize the "obligation to oversee the settlement until all of the benefits have been distributed to the class members".[226] In fact, that obligation is now codified in certain class action statutes such as the *Ontario Class Proceedings Act*, which provides in Section 26(7) that the Court "must supervise the execution of judgments and distributions of awards under ss. 24 and 25".[227]

Judges will typically provide in their reasons for approval of proposed settlements (1) that a settlement administrator and initial claims adjudicators are appointed, (2) that any party to the settlement or settlement administration is allowed to bring a motion for directions with respect to the implementation or interpretation of the agreement, and (3) that the named judge is the only one allowed to hear challenges brought regarding the settlement.[228] For example, in a recent Quebec class action settlement approval judgment, the settlement judge preserved the court's

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[225] Lahav, *supra* note 17 at 91-2. Lahav further remarks that "neither the Rules nor most courts require the parties to report on the ultimate payout at the end of settlement administration." *Ibid* at 87. Nonetheless, Issacharoff and Klonoff give a series of examples of cases in which judges have recently had a proactive role at the settlement's implementation stage: Issacharoff & Klonoff, *supra* note 6 117-19.

[226] *Baxter*, *supra* note 208 at para. 47.

[227] S. 26(7) Ont. C.P.A.

[228] For a copy of all settlement documents and specifics about the settlement's administration, see http://www.ponderal-reduxsettlement.ca/national/index.htm (and for Quebec: http://www.ponderal-reduxsettlement.ca/quebec/index.htm.)

power to supervise the settlement's administration and management, as appears from the following two paragraphs of the judgment:

> 12. THIS COURT ORDERS that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court;
>
> 13. THIS COURT ORDERS AND DECLARES that this Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment.[229]

Obviously, in less complex settlement agreements, there will be no need to require the courts to approve the various stages of the settlement's implementation and give directions to the parties.

Importantly, the settlement judge's function is not exhausted by his decision to approve a proposed settlement. Accordingly, he may remain involved in the implementation stage. The Supreme Court of Canada has

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[229] *C. (J.) c. Bachand*, EYB 2010-173731 (Qc. Sup. Ct.).

established that the judge's function is exhausted when he has "performed his [or her] function".[230] This holding assumes that "a final decision of a court cannot be reopened [because] the power to rehear was transferred […] to the appellate division."[231] In the case of settlement approval, the judge will most frequently stay on file as a result of the settlement approval decision naming him as the designated judge to hear all matters relevant to settlement administration and implementation.

e. Appeal Rights

Throughout North America, only the class action parties may appeal a settlement approval decision.[232] Of course, since parties to a settlement will not generally oppose nor wish to appeal a settlement that they negotiated and willingly concluded, the question is whether the other participants, namely the absent or unnamed class members, are able to do so.

In the Ontario Court of Appeal case of *Maclean v. Dabbs. et al.*[233], motions to quash an appeal from a decision to certify a proposed class action, and for leave to appeal from a certification order were considered. A class action settlement had been approved by an Ontario court under the Ontario C.P.A. One class member who had not sought nor been granted party status sought to appeal. The right of appeal was

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[230] *Doucet-Boudreau v. Nova Scotia (Min. of Educ.)*, [2003] 3 S.C.R. 3, at para. 78. In the U.S., the doctrine applies differently, principally to arbitration law.

[231] *Ibid*.

[232] See in Quebec, *Honhon v. Proc. Gen. Qc.*, [2000] R.J.Q. 235, REJB 1999-15997, para. 35 (Qc. Sup.Ct.) ["*Honhon*"]; *Page c. Canada (Procureur général)*, REJB 1999-15996 (Qc. Sup. Ct.) at para. 35; ("The intent of the Act is clear that the rights of appeal to this court are conferred on parties, not class members.") In Ontario, the references follow below.

[233] [1998] O.J. No. 3622.

found to be specifically limited under s. 30(3) of the Ontario class action statute. The Court further held that the latter section took precedence over the general right to appeal a final order in s. 6(1)(b) of the *Courts of Justice Act*.[234]

In the United States, the general rule is similar that "only 'parties' to a lawsuit may appeal an adverse judgment".[235] But the U.S. Supreme Court in *Devlin v. Scardelletti*[236] has held that since all class members may be bound by the class settlement, absent class members – and not just the parties – are "allowed to appeal the approval of a settlement when they have objected at the fairness hearing" and without having to properly intervene in the action.[237]

Other forms of review are also available in the U.S. courts.[238] For instance, in the *Wolfert v.Transamerica Home First, Inc*., the U.S. Second Circuit heard an appeal that presented "due process challenges to the preclusive effect of a state court judgment approving a class action settlement".[239] The New

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[234] *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The Court held, *ibid* at para. 15, that "it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated." The reasoning of the Ontario Court of Appeal was confirmed once again recently in *Niagara Falls (City) v. Lundy's Lane Portfolio Inc*., [2010] O.J. No. 2593, at para. 26.

[235] *Devlin v. Scardelletti*, 536 U.S. 1 at 7 (2002) (quoting *Marino v. Ortiz*, 484 U.S. 301 at 304 (1988)).

[236] *Ibid* at 10 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.") On this specific issue, see Nicholas Barnhorst, "How Many Kicks at the Cat?: Multiple Settlement Protests by Class Members Who Have Refused to Opt Out" (2005-06) 38 Tex. Tech. L. Rev. 107.

[237] *Ibid*. One example of such an appeal is *Reynolds v. Beneficial National Bank,* 288 F.3d 277 (7th Cir. 2002) ["*Reynolds"*], which is further discussed below.

[238] See Issacharoff & Nagareda, *supra* note 218 at 1706ff.

[239] *Wolfert v.Transamerica Home First, Inc.,* 439 F.3d. 165 (2d Cir., 2006).

York Southern District Court had previously dismissed a complaint seeking a declaratory judgment due to *res judicata*, as the claims were barred by a class settlement approved by a California court.[240] The Appellant argued that "the District Court erred in giving the California judgment preclusive effect because, she claims, the class representatives did not adequately represent her and the notice was deficient in several respects."[241]

III. REFORMING THE CLASS ACTION SETTLEMENT PROCESSES

In this chapter, I have reviewed the positive law regulating class settlement approval in the four target jurisdictions. I end the chapter with reform hypotheses that aim to:

- Provide additional information about the judicial practices and class settlement review and approval processes followed; and

- Clarify and simplify the applicable laws regarding the review and approval processes;

In such ways as to

- Encourage more transparency in the reviewing courts' practices;

- Create consistency and predictability in the settlement processes and practices; and

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[240] *Ibid* at para. 1.

[241] *Ibid* at para. 22.

- Involve the settling parties (particularly the class members), and give them additional control over the litigation outcome.

The processes followed in each of the target jurisdictions are in no way uniform; they are instead guided by judicial discretion and determined on a case by case basis. As such, we have seen that certain judges will hold one fairness hearing, while others will hold two, and others yet again hold a combination of hearings and meetings, formal or not, that may take the form of telephone conferences, in-person conferences, or a variation of both. Only the U.S. federal statutes require that there be at least one, mandatory, fairness hearing. Another example of this diversity in the various laws is the Canadian common law duty of candour, which remains to be further elaborated upon, and exists in a different form in the U.S. federal law. In these instances, a reform requiring uniform and consistent practices throughout North America will aptly assist judges decide what process to follow at the approval stage.

The reform principles I propose below are consistent with my perception of the fundamental *raison d'être* of the class action, summarized in the following four principles of class action settlement governance:

1. Adequacy of representation;
2. Complete disclosure and transparency;
3. Inquisitorial justice; and
4. Respect for class action goals.

For ease of reference, the reform hypotheses are organised under the following sub-headings: a. the negotiations stage; b. the settlement evaluation stage (including the settlement notices); and c. the settlement administration and implementation stage.

a. At the Negotiations Stage[242]

The settlement negotiations are the stage at which the very substance of the agreement is established, and when the settling parties evaluate their interests and their priorities and communicate them to the other party through their attorneys. It is a stage at which involving a judge would be tremendously advantageous for one major reason other than the facilitation of settlements, that is, to become intimately aware of the true fairness and reasonableness of the proposed agreement to class members, as an indicator of the overall fairness and reasonableness of the proposed settlement. Hence, the court's involvement should begin before the settlement's final conclusion, and not just in evaluating the settlement's fairness after its conclusion.

Settlement judges should be able to properly evaluate the gist of the case, and the details and stages of the settlement bargaining. But the reality of class action settlement practice is different. The judges do not have that information,[243] and they are unable to obtain it.[244] That is why I advocate the most complete disclosure and transparency in the class action settlement practices. If we want to have fair processes and outcomes, the

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[242] I have not previously discussed the positive law applicable to the negotiations stage because I have found few – if any – provisions in the class proceedings acts and relevant caselaw about that stage and topic. Hence, there is no corresponding section discussing the positive law applicable at that stage.

[243] See William B. Rubenstein, "A Transactional Model of Adjudication" (2000-1) 89 Geo. L. J. 371 at footnote 43 (referring to the "remarkable informational deficit" of the judges, in the fairness-hearing process), and citing Samuel Issacharoff, "Class Action Conflicts" (1997) 30 U.C. Davis L. Rev. 805 at 808 ("Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favourable court action").

[244] I will further discuss this impression in Chapter IV *infra*.

relevant information must be in the hands of not just class and defence counsel, but also of the judge and the class members.

The judge's role as case manager should not involve facilitation of settlements, or involvement in the settlement negotiations, due to the potential conflicts of interest that may affect the settlement approval stage. Indeed, while judges are in theory forbidden from suggesting amendments or modifications to the agreement (a rule that will be further addressed below in Chapter III), they, in practice, often suggest changes.[245] As soon as they do suggest such a change, modification or amendment, they become conflicted and will have difficulty denying proposed settlements.

Accordingly, when settlement negotiations are envisaged, or when a proposed settlement needs to be renegotiated, in complex[246] class action cases, and the case manager judge is informed of these negotiations, the parties should be referred to a "negotiations judge".[247] This judge would be one other than the case manager or settlement judge, who will supervise the class action case for a few weeks or months to oversee and structure the settlement negotiations. This judge would be briefed by the class action case manager about the case and the procedures to date, and

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[245] Resnik, "Litigating and Settling", *supra* note 36 at 855.

[246] The degree of complexity of the class action case would be evaluated by the case managing judge. A complex case would likely be one which involves hundreds or thousands of class members, an interjurisdictional case, or a case which involves a throroughly complicated transaction.

[247] Judith Resnik similarly believes that judges should be involved in settlement negotiations. She explains that "Judges should be obliged to structure settlement negotiations (ex ante) and to evaluate settlements (ex post) in all aggregates, be they called class actions, MDLs, consolidations or whatever. […] judges should require the many lawyers within aggregates to participate in negotiation processes to enable the diverse interests within the group to be plain." See Resnik, *supra* note 36 at 858.

would then supervise and facilitate the settlement negotiations, in a way similar to Quebec judges involved in *conférences de règlement à l'amiable*, or "*CRAs*"[248], or special mediators in Ontario and U.S. district courts particularly.

The negotiations judge's role would, however, be distinguishable from the the latter judges' roles. The negotiations judge's role and duty would be to achieve a *fair* settlement, a settlement that will likely be approved by the settlement judge at the fairness hearing. At the settlement's conclusion, and in preparation for the fairness hearing, the judge would then sign an affidavit affirming the settlement's fairness and reasonableness.[249]

The negotiations judge would be ideally placed to evaluate the settlement. He would verify that consent was properly given to the proposed settlement, that the settlement is fair and reasonable, that the interests of absent members are being considered, and ultimately, that the class action law objectives are met. He would know about the settlement's negotiations and their duration, about the issues debated and the compromises made by each of the settling parties. To facilitate this

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[248] Quebec's C.C.P. provides in Article 151.11 that "Where required by the nature or complexity of the proceeding or in cases where the 180-day or, in family matters, the one-year peremptory time limit is extended, the chief judge or chief justice may, at any stage of the proceeding, on his or her own initiative or on request, order special case management. In that case, the chief judge or chief justice designates a judge to see to the orderly conduct of the proceeding." Art. 151.12 C.C.P. further provides that "The judge so designated convenes the parties and their attorneys to a case management conference so that they may negotiate an agreement as to the conduct of the proceeding, specifying the arrangements between them and determining the timetable with which they are to comply. If the parties fail to agree, the judge shall determine a timetable for the proceeding." One example of a successful CRA case is the *Brochu* case, *Brochu c. Québec (Société des loteries*), EYB 2010-171457 (Qc. Sup. Ct.) ["*Brochu*, 2010"], in which the parties chose to go to mediation by way of CRA after 125 days of hearing in a time frame of 14 months. This CRA led to a settlement.

[249] This, in effect, is what U.S. mediators involved in class action settlements will sign. These kinds of affidavits have an impact on the settlement judge's decision to approve or deny proposed settlements.

exchange of information, all settlement negotiations should be appropriately documented to be made later available to the settlement judge if required (and within the limits of confidentiality).

In the eventuality where instead the settlement has already been concluded, the negotiations judge should become involved, again in complex cases, in a pseudo preliminary fairness hearing, following which a discussion could be had with the settlement judge about the proposed settlement's fairness.

Implementing this proposal may mean that the costs of the procedure would be higher. The parties would spend additional time preparing their case for these separate hearing stages, but the costs of the additional determination would be borne by the judicial court system. Moreover, these additional costs would be justified by the more extensive safeguard provided by this dual approval.

There is a risk, of course, that the negotiations judge will then be biased in favour of settlement, having participated in its negotiation and conclusion, in which case there would still be no other adversary to the class settlement. Another risk is that proposed settlements be automatically approved by the fairness hearing judge considering the fact that a colleague has previously examined the fairness issue. But the ultimate objective of the approach would be to have a neutral, objective and unbiased settlement judge, particularly in complex class action cases, and in that view, having another handle the negotiations appears beneficial.

In practice, it is difficult for settlement judges to separate the simultaneous roles that they have, at the fairness hearing, of manager and adjudicator. They are asked to simultaneously evaluate the class action, supervise its organisation, and administer it. There is a good chance that settlement will

come up at some point during the case managing conferences or meetings, and that the judge will feel urged to encourage the parties to settle, due in large part to the public policy favouring settlements. But this judge will later be asked to evaluate the fairness of the proposed agreement and approve the "deal". It may then be hard to disapprove the settlement. Other than the goal of information, the potential of conflicts is another serious reason for having another judge participating in the settlement negotiations.

For class action settlement practices, and their processes and outcomes to be fair, the requirement of adequacy of representation should be reinforced in the settlement context. During settlement negotiations, class counsel should be assisted at all times by the class action representative. Counsel should verify the representative's understanding of the proposed agreement and remain available to explain the deal's more complex provisions. Counsel should also require that the representative explain the agreement to all known class members with whom he or she has established a prior relationship.[250] These safeguards would help ensure the serious involvement of the representative on behalf of the class members, at all stages of the class action, including settlement.

In fact, at the settlement negotiations stage, I whole-heartedly agree with Professor Resnik's proposal that

> proposed settlements of class actions be negotiated in a manner that: (a) makes visible the many different aspects of the alleged injuries suffered by class

[250] Empirical studies would in fact be welcome, in the context of future projects, addressing the true relationship of counsel with the representative at that stage.

> members; (b) informs class members of the potential for settlement as early as possible; (c) gives class members information about those negotiating on their behalf; (d) puts responsibility on the court for structuring means to enhance fairness during the course of such negotiations; and (e) scrutinizes settlements with special attention to the amount of litigation that preceded them.[251]

Once the agreement is concluded, the parties are required to present a joint proposal or stipulation of settlement to the reviewing judge, with affidavits and all relevant documentation regarding the proposed settlement. The duty of candour and disclosure of the settling parties should begin to apply at this stage, and should motivate the settling parties and their counsel to be as transparent as possible regarding the negotiations stage.

Finally, counsel fees should be negotiated separately from the settlement. Conflicts of interest are inherent in the settlement context. Negotiations of counsel fees should be held separately from the negotiation of the proposed settlement, and at a distinct moment, time and place. Accordingly, the parties will, for example, meet at an early stage and discuss the percentage of the proposed settlement they ultimately agree to reserve for counsel fees.

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[251] Judith Resnik, "Litigating and Settling", *supra* note 36 at 852.

b. At the Settlement Evaluation Stage

Within the four target jurisdictions, only Ontario courts have specialized class action judges operating in a distinct class action section. There are important advantages to having specialized judges evaluate the fairness of proposed class action settlements. They may understand the provisions of very complex agreements better than non-specialised judges, mostly because they have reviewed a greater variety and number of them. In addition, because one element of the fairness determination is the comparison of the deal with the alternative outcome of trial, one must have experience in the class action field, specifically with respect to class settlements, and these specialized judges seem ideally positioned for the task. Accordingly, it should be recommended to court administrators that class action sections be created, where class action settlements reviews are given exclusively to specialized judges.

Leaving aside the discussion and proposal regarding the standard of settlement fairness for Chapter III, I now turn to the process of settlement review and approval. I have previously discussed the benefits of the fairness hearing, notably the fact that it allows parties to be heard and to object, and the judge to properly hear the oral representations and evaluate the fairness of settlement. In fact, the fairness hearing fulfils the information objective, in such a way that without it – and the evidence presented – judges would not know nearly enough about the proposed deal's fairness and reasonableness to evaluate it and give their approval.

I hereby suggest that a formal, public fairness hearing should continue to be made mandatory to evaluate the fairness of proposed settlements. There may be preliminary meetings, conducted, as I have explained, by a negotiations judge, but there should always be one formal fairness

hearing. The preliminary meetings should not be referred to as "fairness" hearings because they should not give the parties an impression that the judge will evaluate and decide the fairness of settlement at that stage (or be perceived by the judges as such). Accordingly, the principal objective of these hearings should not be to preliminarily approve the settlement, but should instead be to engage in a discussion about the settlement and how it might be improved, or how solutions might be found to existing problems, such that it might be approved more easily at the final fairness hearing stage. The preferred methods for the hearing should be the teleconference or videoconference, which are more economical for the settling parties.

At the preliminarily review stage, the judge should review the proposal with great efforts and involvement. This judge will be a negotiations judge in complex cases (and if he is properly assigned to the case), and otherwise a settlement judge. At this stage, the judge should already be inquisitorial in stance; asking questions, actively reviewing documents, discussing with the parties about their positions and potential areas of concern in the settlement. Generally, he should attempt to find solutions to areas of concern, the whole in keeping with a more conciliatory role.

Full disclosure should, again, be exercised, at all stages of the review and approval process, by the settling parties toward each other and toward the judge, in line with the existing duty of candour (and within the limits of confidentiality). Information should be given relative to compensation of the class members, what remedy will be given, and how much it will cost to compensate them. Any and all variations in compensation between members or classes of members should be explained and justified. The details of attorney fees should be properly explained and justified. A well-reasoned explanation from class counsel should be included in the written

proposed agreement about how the proposed settlement fulfills the class action objectives, and should also be given orally (both at the preliminary stage and later on at the fairness hearing). Notably, an explanation should be given about how efficiency and judicial economy will be furthered by the settlement, and why this particular settlement will serve to deter the defendant(s). If a negotiations judge was involved in the settlement's conclusion, an affidavit from this judge should be included, detailing his or her reasons for finding the settlement to be fair and reasonable.

Throughout North America, notices should be sent both before and after settlement approval, through the most technologically advanced and appropriate means.[252] Sending a formal notice of the impending fairness hearing to class members should be required, informing them of their right to communicate their opinion about the proposed settlement at the fairness hearing, and also, of their right to object to the settlement (and of the delays to do so). Judges should never hear the parties and counsel about the settlement's fairness before they are assured that sufficient notice has been given, and that sufficient time has been provided for the notice to be sent out.[253] The notice should be drafted, and judicially reviewed and approved at the preliminary review stage. No notice should be required to inform of the preliminary fairness reviews, as these reviews are not generally prejudicial of class members' rights, their main objective

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[252] Alexandra Lahav also believes that there should be notices sent at these two stages of the litigation, but her proposal for reform is different from mine, principally because it is highly specific and lists the precise information that must included in the notices. See Lahav, *supra* note 17 in text accompanying footnotes 270-271. I instead believe that clarity and candour should guide the disclosure process, and accordingly, that the required information should be decided on a case by case basis.

[253] Judith Resnik similarly supports the proposition that sufficient time must be given to warn members of the settlement's existence. She adds that this notice should allow for "the production of sufficient information for the court and the class members." See Resnik, "Litigating and Settling", *supra* note 36 at 859.

being to prepare for the formal fairness hearing. A formal notice should however be sent to inform the members of the date and place of the final fairness hearing well in advance.

Another notice should also systematically be sent to inform the parties of the issuance of a decision on settlement approval, and to remind the parties that if they wish to claim moneys in the settlement's administration, they must do so pursuant to the settlement's provisions and the settlement approval decision. This notice should also ideally disclose, this time as Lahav explains, the amount of counsel fees, the number of claimants and opt-outs, the total amount of the settlement funds and value of the coupons, if applicable,[254] but only if adding this information does not disproportionately lengthen the notice.

Great attention should also be given to the content and quality of the settlement notices as they are an absolute condition to complete disclosure and transparency to the class members, adequate representation, respect for class action goals, and hence, to a fair and equitable settlement. The notices should be carefully crafted, in light of informing the greatest number of potential class members of the settlement's conclusion and upcoming fairness hearing.[255] The creation of websites with full settlement details should be encouraged. The words "simplicity", "clarity" and "accessibility" are key here: settlement notices should be written in plain language. They should be very short (hold in one page) and simple enough to be understood by all class members, regardless of level of education. They should also include a short definition of the class, a summary of the terms and conditions of settlement (in one or two

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[254] Lahav, *supra* note 17 in text accompanying footnote 271.

[255] See *Manual*, *supra* note 12 at 321ff.; *Pocket Guide*, *supra* note 168 at 18ff.

sentences), a simple explanation of the rights of opt-out and to object, and a disclosure of the amount of counsel fees requested.

Except for cases where it is found to be a better, simpler or less costly approach, in cases where there are very few class members, for instance, or where a medical injury is at stake, notices should not have to be sent individually. To respect judicial efficiency objectives, they should instead be sent indiscriminately, through the most wide-reaching technological means and/or media available. A very short new notice should be sent each time the settlement agreement is amended and re-submitted formally for court approval. This notice should be very brief, and ideally sent through the media or Web, such as to keep the costs of diffusion low. While it would be fair to afford a second right of opt-out in the notice of settlement, similar to U.S. Rule 23(e), to specifically inform members about the settlement's terms,[256] I do not believe that defendants would generally agree to settle class cases under these conditions.

At the fairness hearing, the settlement judge should carefully hear the arguments made by counsel, the testimony given by the parties, if any, and any arguments made by objectors against (or in favour of) the settlement. Because they are the primary ones concerned by the class action and its fair resolution, class representatives should be systematically required to explain why they support the proposed settlement agreement and why it is the best resolution for them and for the class. This testimony should evidence a good understanding of the

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[256] Eric D. Green, "What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 Into the Twenty-First Century" (1996-97) 44 U.C.L.A. L. Rev. 1773 at 938 and 940 (Explaining that the second opt-out makes the "decision to remain in the class […] likely to be more carefully considered and […] better informed when the settlement terms are known"; and also that "it empowers all class members to make an informed decision whether to remain in the class action.").

issues, and the representativeness should be made clear to the judge. Furthermore, the settlement judge should encourage counsel to focus their oral argument on elements other than the ones elaborated in the written pleadings and affidavits.

As will be further outlined below in my review of the settlement fairness factors, courts should pursue an independent analysis of the settlement terms regardless of the presence or absence of objectors to a proposed settlement. Objections should nonetheless be encouraged and seriously considered when made, as they may well raise problematic issues about the proposed settlement that demand greater scrutiny of the fairness and reasonableness of the settlement. When there are no objections, however, the judge should only presume fairness of settlement if, based on the evidence provided, this absence of objections results from the members' entire satisfaction with the proposed settlement, instead of their mere inaction due to ignorance about the class action or settlement's existence.

When deciding whether to approve a proposed settlement, the settlement judge should properly understand what the case was worth, why it has settled, and why this was the best, more just solution for all members. There should be no automatic recitals of the lists of fairness factors. Instead, this judge should act inquisitorially, in a way to seek the truth about the settlement's worth, effect and consequences. Solid evidence about the settlement's monetary value, foundation and justification will need to have been provided and support the judgment to approve or disapprove. This method will serve to ensure that the class action law objectives are met through the settlement.

When the settlement judge is placed in a situation where red flags, or problematic areas are found in the document (when for example class

members are inequitably compensated by the proposed deal), and he (1) does not know how to solve them or how to help the parties solve them; or (2) does not know how to evaluate the settlement as some of its areas are too complex or specific by nature to be properly understood by him (such as for example, the case where a proposed settlement involves highly specialized notions of pharmaceutics or mechanics, which are too complex for a non-specialist to understand), experts should be appointed to assist in evaluating these technical elements and the settlement's adequacy, fairness and reasonableness.

Court monitors or counsel for the court may also be appointed at the settlement approval stage, and should be welcomed, especially in highly specialised cases where the agreement is particularly complex, or where negotiations were difficult and showed a great diversity of interests. These court monitors should be paid by the defendants, from a separate fund, and should not be practitioners, but should instead be professionals with no client allegiances, such as government officials or law professors.

At the end of the fairness hearing and review stage, the settlement judge must decide whether to approve or deny the proposed settlement. He must issue a written judgment with a detailed statement about the reasons for judgment and evaluation of the evidence submitted. Instead of blindly repeating and relying on the list of factors of fairness to justify his judgment, this judge should evaluate the settlement's fairness according to the indicia of procedural and substantive fairness discussed in Chapter III. These written reasons for judgment are important as they serve as a useful precedent for judges and parties in future approval cases. They also serve to inform the public about the judicial practices of approval, and ultimately support more transparent practices. Nonetheless, the judgment

may be very short in specific instances where fairness and reasonableness of settlement appears on its face.

The judgment on approval should be considered as final and determinative. No right of appeal should be afforded to class objectors, who were already given a chance to object to the settlement's fairness. Finality and peace of settlement should be prioritized, in the interest of all members of the class and in order to preserve the class action law objectives of access to justice and deterrence.

c. At the Settlement Administration and Implementation Stages

Judges throughout North America should review the settlement's administration provisions *item* by *item*,[257] such as to ensure that the settlement compensation can easily be claimed by the class members. They should also oversee the execution and administration of the settlement until all benefits have been distributed, and should remain involved in the settlement's administration and implementation. This process is required to achieve fairness of process and outcome for class members and for all concerned by the class action and its settlement.

This post-judgment jurisdiction is not only warranted by the circumstances and stated objectives of the class action, but permitted by the class action rules. It is also consistent with another governance principle of complete disclosure and transparency of the practices. This would come into play when judges are informed of the outcome of a

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[257] See *Clavel v. Productions musicales Donald K. Donald inc.* (19 January 1996), Montréal, 500-06-000010-922, J.E. 96-582 at 16-17 (Sup. Ct.) (« Il ne s'agit pas pour le tribunal d'estampiller candidement une entente intervenue. La distribution du reliquat doit être examinée à son mérite. Le tribunal doit étudier la suggestion de distribution du reliquat formulée […] et ce, item par item. »)

settlement that they approved a few months prior, and realise for instance that it should not have been approved because too few members actually claimed any of the moneys made available through the settlement, and were ultimately compensated. Finally, this jurisdiction and involvement is consistent with the overriding managerial functions of the class action judge[258], and with the "pro-active and continuing role of the judge in the litigation, as the class action settlement progresses to its final determination"[259].

In practice, to maintain this continued jurisdiction over the settlement, judges should require in their reasons for judgment that the parties and counsel, or the settlement administrator (where one is appointed) report back periodically about the settlement's success (distribution of funds, implementation of specific procedures, deterrence if any, etc.), in the form of short reports with information about distributions that have been made, and of a more general progress report. They should also appoint claims administrators or special masters, and describe their specific duties in the reasons for settlement approval. Among these duties would be a periodic reporting of all distribution activities, as well as a more general progress report.[260] The judge who approved the settlement initially should remain available as a reference judge to hear claims, challenges or litigation relevant to the settlement's administration and implementation.[261] Finally, one last, short hearing in the form of a more economical telephone

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[258] Mulheron, *supra* note 38 at 71.

[259] *Smith v. Canadian Tire Acceptance Ltd*., 22 OR (3d) 433 at para. 42 (Gen. Div. 1995). Also see *Chartier v. Meubles Léon Ltée*, EYB 2006-111686 (Qc. Sup. Ct.).

[260] *Manual*, *supra* note 12 at para. 21.661.

[261] For one recent example of such a case in which the settlement judge remained involved in the claims process, see *Harrington v. Dow Corning Corp.,* [2010] B.C.J. No. 867.

conference should be held at the close of the settlement's implementation by the same judge who approved the settlement, in order to ensure the settlement's fair outcome for all class members, in respect of all the class action objectives, and of the importance of information and transparency of judicial practices.

CH. II: CLASS ACTION SETTLEMENT ACTORS

From the very filing of a proposed class action, relationships are created by and between the lawyers, the class representatives, the named and unnamed – or absent – class action members, and the case managing judge. These relationships generate an intricate web of legal issues regarding adequate representation and legal ethics[262], notably, which are particularly relevant to the context of settlement. For instance, how must class counsel and class representatives interact with the rest of class, and absent members particularly? How can class counsel obtain informed consent from their "client"? What is the extent of the required communications between them? These relationships must also be situated within the context of collective litigation and the contemporary characteristics of modern civil justice.

In this chapter, I explore the roles and responsibilities of the principal actors involved in class action settlements, and the relationships created through class action settlement negotiations and approvals. Ethical issues of importance may be raised, in this context. Precisely, I address the roles of class counsel and of the class action representatives, discuss their relationships with and responsibilities toward class members, and propose hypotheses for reform of these roles and relationships. I later address the role of the settlement judge, and relate that role to the face, characteristics and evolution of modern civil litigation. The chapter is

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[262] On the issue of legal ethics and class action settlements, see Menkel-Meadow, "Ethics", *supra* note 13 (where the author discusses the ethics of mass tort settlements and argues, at p. 1159, that "the current ethical rules on conflicts of interest, limitation of practice, and ethics in negotiation and litigation (...) were not drafted with the special issues of mass tort class action settlements in mind, and do not, (...) provide adequate guidance for how these issues should be resolved." She adds that "our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for 'aggregate' justice.").

concluded by extensive reform hypotheses applicable to the role and responsibilities of the settlement judge.

I. THE RELATIONSHIPS CREATED BETWEEN CLASS REPRESENTATIVES, CLASS COUNSEL AND THE ABSENT CLASS MEMBERS

a. Who Are the "Absent" Class Members?

Each and every person who joins in or is a member of a class action lawsuit is considered to be a class "member", but only once the class is certified. Before certification, the only official member of the class is the "class representative" or "named plaintiff". All other potential members are unnamed class members, commonly referred to as "absent class members". Put differently, an "absent class member" is an individual who is defined as a class member but is not named in the lawsuit and does not actively participate in the litigation.[263]

Once a class action case is certified, the class becomes official, and comprised of one or a few more "named" class members, and a great number of unnamed or "absent" class members who all presumably share

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[263] Although it is U.S. state law and not federal law, see principally *Wyly v. Milberg Weiss Vershad & Shulman*, 12 N.Y.3d 400 (2009), for the importance of the case rendered by New York's highest court. In *Wyly*, the Court held that absent class members do not have the same attorney-client relationship with counsel as the representative. Hence, they do not have a "presumption of access" to class counsel's file, or to the work product. The Court cited *Hansberry, supra* note 37, *Wyly*, *ibid* at para. 1 ("An absent class member is a member of a putative or certified class who is not a named party"). Also see, importantly, another state court, this time from the California Appeal's Court, in *Martorana v. Marlin & Saltzman et. Al.*, 2009 Cal. App. LEXIS 1076 (Ct. of Appeals, Second Appellate District, July 1, 2009), where the Court similarly examined the relationship between counsel and the absent class members and held that "Class Counsel owed a duty of care to the class as a whole to represent all class members in the […] action with such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of their tasks."): see *Martorana*, *ibid* at para. *12.

the same or a similar interest in the class proceeding. These members will at some point be sent a notice of the impending, certified class action, but many of them will, in all likelihood, remain unaware of the class action's existence.[264] Hence, unnamed or absent class members exist from the time of the lawsuit's filing, but they usually remain inactive until they opt-out, object or claim compensation.

They are, nevertheless, the principal reason for having a class action, and the principal beneficiaries of the settlement. Moreover, as discussed above, all members including absent ones are bound by the class judgment or settlement, unless they choose to opt-out.[265] Absent members are officially unrepresented until certification, but Ontario courts have held that they must be protected by the representative, class counsel and the judge from the time of filing of the class action due to the existence of "a [*sui generis*] relationship between counsel and the members".[266]

Accordingly, prior to certification, a case commenced as a class action is merely an intended class action or proceeding, or an "ordinary action with

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[264] See e.g. Robert H. Klonoff, Mark Herrman and Bradley Harrison, "Making Class Actions Work: The Untapped Potential of the Internet" (2008) 69 U. Pittsburgh L. Rev. 727. For a recent example of an exceptional class action case in which all members of the class were known and where the court was able to conclude "that all persons whose interests will be determined by this proposed settlement have been made aware of it", see: *Kotai v. Queen of the North (The)*, [2010] B.C.J. No. 1645.

[265] See e.g. *Shutts*, *supra* note 82 at 808 ("The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest").

[266] *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536 (S.C.J.), aff'd [2008] O.J. No. 4928 (Div. Ct.) at 80 and 78 (quoting a previous Ontario case: "[Proposed class members and class members] are not parties to the proceedings but they are not strangers. Their rights are as much at stake as those of the plaintiffs. It is consistent with their ***sui generis*** status, and the objectives of the CPA, that their interests should not be vulnerable to deficiencies in the ability of the named plaintiff to represent them."). Also see *Berry v. Pulley*, [2011] O.J. No. 927, at para. 73 (Perell, J.) (Sup. Ct. J.).

ambition"[267]. There is a proposed class action representative, a projected (or anticipated) group or class of people with common issues, and class counsel to represent the class representative. Nonetheless, the nature of the proceeding requires that the interests of the potential class and unnamed or absent members be protected, even before certification, from the very moment of initial filing.[268]

From the very moment of the class action's filing, in the four stated jurisdictions, class counsel and the courts are required to be concerned with protecting the interests of all class members – including absent ones. This duty of protection takes the form of a duty to "not injure" and "not prejudice" the absent members' interests, in Ontario. In *Coleman v. Bayer*,[269] the court explained that

> when asked to approve a settlement, the court must exercise vigilance and scrutinize its fairness with an eye to the possibility of abuses. Vigilance is also required when determining whether the discontinuance of proceedings against some members of the original putative class will injure, or prejudice, their interests.[270]

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[267] *Mackinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd*, 2004 BCCA 472, B.C.L.R. (4th) 21 at para. 33, 33.

[268] *Logan v. Canada (Minister of Health)* (2003), 36 C.P.C. (5th) 176 at paras. 11-13 (Ont. Sup. Ct. J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.). *Berry*, *supra* note 266 at 83ff.

[269] *Coleman v. Bayer Inc.* (2004), 47 C.P.C. (5th) 346 at para. 81 (Ont. Sup. Ct. J.).

[270] *Ibid* at para. 81. In that case, the court prioritized the interests of potential class members in its decision to approve a proposed settlement. The settlement provided

After certification, the interests of absent members are made more certain, as the common issues and class are defined, and as class members become identifiable. At this stage, an attorney-client relationship is then established between counsel and the members of the class – whether present or absent.

One critical issue that arises here is whether and how absent class members can properly *consent* to a proposed settlement. Because the class action is a representative action, it has procedural protections or safeguards through which the "client's" consent is given. The class must have adequate representatives, proposed settlements must be approved by the courts to be made effective, and class members are entitled to appear and object, sometimes opt-out of the class action settlement, and in certain instances, appeal a decision to approve a class settlement.[271] But how is consent *specifically* given in this collective context?

For Carrie Menkel-Meadow, consent to settlement in a collective context is justified by one of the following three approaches: first, the court can constructively find consent for the members, at the fairness hearing stage, second, consent may be given implicitly through silence by the members following adequate notice of the proposed class settlement, or third, consent may be given through the actions and representations of the class

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compensation to those who developed the condition Rhabdomyolis and excluded some potential class members who were included in the original class definition. Cullity J. chose not to examine whether the settlement is "in the best interests of the class as a whole". Instead, in approving the settlement, he considered whether the proposed settlement would prejudice the interests of potential class members who would be excluded if approval is granted.

[271] See notably *In re Diet Drugs*, 431 F.3d 141 (at 145 (3d Cir. 2005) at para. 11 ("In a class where opt out rights are afforded, [due process] protections are adequate representation by the class representatives, notice of the class proceedings, and the opportunity to be heard and participate in the class proceedings.") (citing *Shutts*, *supra* note 82, 811–12 (1985)).

action representative.[272] For Issacharoff and Nagareda, by contrast, consent is given by class members, "through their failure to withdraw [by opting-out] from the class representation."[273]

In my view, consent cannot be derived from mere inaction or silence by the class members.[274] Consent is instead considered to have been given through the actions of adequate representatives, of both class counsel and the class representative. This adequate representation will have been aptly verified judicially at both the certification and settlement approval stages, as further discussed below in subsection d.

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[272] Menkel-Meadow, "Ethics", *supra* note 13 at 1158-59. And see Bronsteen, *supra* note 83 at 923, who explains that class settlements are not treated by the U.S. Supreme Court as contracts, as consent to ordinary contracts cannot arise from silence, while it can arise from silence in the class action context (explaining that a settlement is "simply 'an agreement ending a dispute or lawsuit', […] its character is principally that of a private contract in which one party relinquishes its right to litigate in return for something of value from the other party […] We thus treat ordinary settlements as contracts. We do not, however, currently treat class settlements as contracts.") Bronsteen also argues, more largely, that "[o]ur legal system thus has no clear ground on which to demand adherence to the terms of a settlement, such as a class settlement, in the absence of consent." *Ibid*, at 926. By contrast, the collective settlement is viewed as a contract in the Dutch Collective Settlement of Mass Damages [Wet Collectieve Afwikkeling Massaschade, "WCAM"], Stb. 2005, 340. The WCAM entered into force on 27 Jul. 2005 (Stb. 2005, 380). See Willem H. van Boom, "Collective Settlement of Mass Claims in the Netherlands", in Matthias Casper et al., Auf dem Weg zu einer europaischen Sammelklage? (Munich: Sellier ed., 2009) 171, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456819, at 10 (where the author explains that "the foundation of WCAM 200 is a contract between the alleged tortfeasor and an organisation representing the interests of the injured individuals. In practice there are at least three original parties to the settlement contract:

> 1. The alleged tortfeaso(s);
>
> 2. The foundation or association that negotiated the settlement in the interest of injured individuals (…);
>
> 3. The administrator – usually the foundation that was incorporated especially for the purpose of distributing the settlement sum or fund – that will execute the settlement and act as trustee of the settlement fund.").

[273] Issacharoff & Nagareda, *supra* note 218 at 1654.

[274] See e.g. Green, *supra* note 256 at 941 ("Inaction should not be treated as consent when consent is not the most likely explanation for the inaction.").

b. Can Class Counsel Properly Act as Fiduciaries of Absent Class Members?

In class action litigation, class counsel have a direct relationship with the class representative, an indirect one with the class, and responsibilities that vary depending on the stage of the class proceeding, on the focus jurisdiction, and on whether certification has occurred or not. This subsection will serve to discuss these varying responsibilities.

Prior to certification, Ontario courts have held that class counsel represent the representative only and that there is no attorney-client relationship *per se* with the members of the potential class, with absent class members.[275] They have, nonetheless, recognized that class counsel have a *sui generis* relationship with class members before certification that brings responsibilities.[276]

These responsibilities will arise in cases where the plaintiff or the defendant communicates or deals with members of the proposed class and "create[s] an injustice or undermine the integrity of the class action".[277] Indeed, in *Pearson v. Inco*[278], for instance, a class action was commenced against Inco, and pending certification, Inco contacted potential class members to arrange environmental testing at its properties. The plaintiff asked Inco to disclose the names of the residents it had contacted. The court held that in this specific instance, there was an attorney-client relationship with the potential class members, which meant that a rule of

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[275] *Mangan v. Inco Ltd*. (1998), 38 O.R. (3d) 703 (Gen. Div.).

[276] *Richard v. British Columbia,* [2007] B.C.J. No. 1645 at para. 42.

[277] *Pearson v. Inco Ltd*., [2001] O.J. No. 4877 at para. 18 (Sup. Ct. J.).

[278] *Ibid*.

professional conduct, prohibiting contact with a person represented by a lawyer, had been breached.[279]

Upon certification, the Canadian common law focus jurisdictions agree that class counsel have an attorney-client relationship with each and every member of the class as certified.[280] What does this relationship entail, in the specific context of settlements of certified class actions? The Canadian common law courts have held that class counsel "owe fiduciary duties "to every class member, named or unnamed, present or absent.[281] They are required "to act in the best interests of" the entire class and their duty of loyalty extends to *all* members of the certified class.[282]

This duty of loyalty has been interpreted by the B.C. Supreme Court as including "the duty to avoid conflicting interests, the duty of commitment

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[279] *Ibid*.

[280] *Glover v. Toronto* (City of), [2009] O.J. No. 1523 at para. 92 ("There is little doubt that if this action is certified, a solicitor-client relationship will exist between counsel for the representative plaintiffs and the members of the class."); *Richard, supra* note 276 at paras. 41ff.; *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (S.C.J.), [2004] O.J. No. 2308 at para. 7 ("it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of a class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all the duties and obligations that arise under a solicitor and client relationship with respect to the class members including the obligation to represent the class members "resolutely and honourably".").

[281] *Lau*, *supra* note 136 at para. 19 ("In class proceedings, counsel have special responsibilities to advise representative plaintiffs not only with respect to the procedural requirements of the CPA but, also, with respect to their responsibilities to advance and protect the interests of class members."); *Richard, supra* note 276 at paras. 41-42.

[282] Several American cases were cited by the B.C. Supreme Court in *Richard*, *ibid*, to support the duty to represent the class as a whole: *Pettway v. American Cast Iron Pipe Co*., 576 F.(2d) 1157 (5th Cir. 1978), *Parker v. Anderson,* 667 F.2d 1204 (5th Cir. 1982), *Maywalt v. Parker and Parsley Petroleum Co*., 67 F. (3d) 1072 (2d Cir. 1995).

to the client's cause and the duty of candour."[283] Thus, when faced with a situation of potential conflict between the representative and other class members, or between their interests and those of the members, class counsel may present "an application for directions or for approval of the settlement".[284] The court bears the responsibility to "ensure that the interests of the class members are not subordinated to the interests of either the representative plaintiff or class counsel".[285]

The duty of candour, comprised in the duty of loyalty owed to the class members, is one of "full and frank disclosure of all material information" to the Court[286], of all information relevant to the fairness determination. Since both class counsel and defence counsel are the "main source of information about the settlement" [287], they must both

> disclose fully all agreements and understandings, including side agreements with attorneys or class members and be prepared to explain how the settlement was reached and why it is fair and reasonable. Counsel must also disclose any facet of the settlement that may adversely affect any member of the

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[283] *Richard, supra* note 276 at para. 42.

[284] *Ibid*.

[285] *Ibid* at para. 39.

[286] *McCarthy, supra* note 117 at paras. 19-21.

[287] *Manual*, *supra* note 12 at para. 21.641.

> class or may result in unequal treatment of class members.[288]

The duty of disclosure also exists to a more limited extent under U.S. Federal Rule 23(e)(3) requiring that "any agreement made in connection with the [settlement]" be filed with the proposed settlement agreement.[289]

In Quebec, the status of class counsel is peculiar: they are considered to represent the representative only, at all stages of the class action, while the class representative represents the class members.[290] Accordingly, class counsel do not represent the class. Nonetheless, there will be an attorney-client relationship between the members of the class and class counsel in specific instances where they are asked to file personal claims on behalf of the members after final judgment on the merits.[291]

Class counsel may be placed in a difficult situation when negotiating their fees simultaneously with the other provisions of a proposed class settlement. This situation may create a plethora of ethical issues that courts have yet to address and discuss.[292] As Perell J. so aptly explains in *Berry v. Pulley*,

> As is well known, the settlement of class actions raises very difficult ethical problems for class counsel because of the

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[288] *Ibid.*

[289] F.R.C.P. 23(e)(3).

[290] *Brochu*, *supra* note 248 at paras 29-31. Also see *Pellemans v. Lacroix*, [2008] J.Q. No. 4054 at para. 27 (Qc. Sup. Ct.).

[291] *Brochu*, *ibid* at paras. 30-31.

[292] See e.g. Hensler et al., *supra* note 15.

> inherent conflicts of interest that arise because class counsel has an enormous financial interest in the class members' causes of action. There is also the potential conflict of interest of class counsel of having legal and ethical responsibilities to class members whose interests and not homogeneous.[293]

One interesting discussion of ethical issues relating to representation by counsel is the *Dabbs v. Sun Life Assurance Co. Of Canada* case[294], where the Ontario Divisional Court held that class counsel were not placed in a situation of conflict of interest by the "simultaneous negotiation of the settlement and fees".[295]

In the United States, the essence and nature of the relationship between class counsel and the absent members has not yet been defined,[296]

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[293] *Berry*, *supra* note 266 at 80.

[294] *Dabbs No. 1, supra* note 11 at 48.

[295] *Ibid.*

[296] See e.g. Nancy J. Moore, "The Absence of Legal Ethics in the ALI's Principles of Aggregate Litigation: A Missed Opportunity – And More" (May 10, 2010, Boston U. School of Law Working Paper No. 10-13), at 8; Nancy J. Moore," Who Should Regulate Class Action Lawyers?", 2003 U. Ill. L. Rev. 1477 at 1478 (2002) ("There **...** [is] difficulty applying existing rules of conduct **...** because of confusion regarding the relationship among class counsel, the named class representatives and absent members of the class."); Debra Lyn Bassett, "Pre-Certification Communication Ethics in Class Actions" (2002) Georgia L. Rev. 353. Also see Mindi Guttmann, "Absent Class Members: Are they Really Absent? The Relationship Between Absent Class Members and Class Counsel with Regards to the Attorney-Client and Work Product Privileges" (2008-09) 7 Cardozo Pub. L. Pol'y & Ethics J. 493 at 494.

especially before certification. What is nonetheless clear is that this relationship is *not* a traditional attorney-client one:[297]

> Counsel for a class is in a unique position. Absent class members are not individual clients. Thus, *the ordinary attorney-client relationship does not exist between each class member and class counsel*. Yet, there clearly is a duty imposed upon class counsel -- by the rules of professional conduct and by Fed. R. Civ. P. 23 -- to protect the entire class fairly and adequately and to work diligently to maximize class recovery. [italics added][298]

In fact, the majority view is that if an attorney-client relationship does exist, it does not properly exist until the district court certifies the class.[299] Accordingly, before certification, all class members are inactive and do not maintain any responsibilities.[300] It is not until after a class gets certified and notice of the class membership is sent out, that all class members, including absent ones,

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[297] *Re Community Bank*, *supra* note 201 at 313 (3d Cir 2005); *Wyly, supra* note 263 at 17 (quoting Third Circuit Task Force Report on Selection of Class Counsel, 208 FRD 340, 347-348 [Jan. 15, 2002]).").

[298] *Wyly*, *ibid* at 17, quoting the Third Circuit Task Force Report on Selection of Class Counsel, 208 FRD 340, 347-348 [Jan. 15, 2002]).

[299] *Wyly*, *ibid* citing *Van Gemert v Boeing Co.* (590 F2d 433, 440 n 15 [2d Cir 1978], affd 444 US 472 [1980]), ("[a] certification under Rule 23 (c) makes the Class the attorney's client for all practical purposes . . . The judgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented").

[300] Guttmann, *supra* note 296 at 505-06.

> have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. […], [and even once it is certified], [t]he relationship [that does exist] between class members, who are part of a certified class, and *that of the class attorney is not identical to a traditional attorney-client relationship*. [italics added][301]

Hence, before certification there is a semblance of attorney-client relationship between counsel and the members, because the defendants cannot directly contact absent class members, and absent class members cannot claim class counsel's work product.[302]

When a judge finds class counsel "adequate" for purposes of class certification, an attorney-client relationship is created.[303] Class counsel are then considered as lawyers with fiduciary duties to the entire class.[304] Hence, they must protect their interests "even [and especially!] in circumstances where the class representatives take a position that counsel

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[301] *Ibid*.

[302] *Ibid* at 509-510.

[303] See e.g. *Amos v. Board of Directors,* 408 F.Supp. 765 at 774 (E.D.Wis.1976) ("In certifying a class action, the Court not only confers on absent persons the status of litigants, but in addition it creates an attorney-client relationship between those persons and a lawyer or group of lawyers").

[304] See e.g. *Mirfasihi v. Fleet Mortgage Corp*., 450 F.3d 745 (7th Cir. 2006) at 748 ["*Mirfasihi*"] ("district judges presiding over proposed class settlements are 'expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole' because 'class actions are rife with potential conflicts of interest between class counsel and class members'"). Also see *Wyly*, *supra* note 263, quoting *Greenfield v Villager Indus., Inc.,* 483 F2d 824 [3d Cir 1973] at 832.

consider contrary to the interests of absent class members", in which eventuality they are required to discuss the proposed settlement with the court.[305]

In fact, class counsel must "vigorously" and "tenaciously" protect class members[306], in such a way as to, "pursue their clients' claims, make a reasonable effort to assess the fair settlement value of those claims, and pursue a settlement that approximates that value, always taking into account the ever-present risks of litigation."[307] Class counsel are responsible for ensuring the respect of the best interests of the class as a whole, and their responsibility continues, even after a proposed settlement is approved or rejected by the representative.[308] They must continue to represent the members until the litigation is brought to an end by settlement or judgment.

In addition, "[c]ounsel, although taking instructions from the representative plaintiffs, must also ensure that those plaintiffs are properly advised, both as to their duty to the class as a whole and that the prosecution of the action must be carried out in a manner that advances the interests of the class."[309] First, they must discuss settlement proposals

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[305] *Manual*, *supra* note 12 para. 21.641, citing *Flinn v. FMC Corp*., 528 F.2d 1169 at 1174–76 (4th Cir. 1975); cf. *Parker v. Anderson*, *supra* note 282 at 1211.

[306] *Epstein v. MCA, Inc*., 126 F.3d 1235 (9th Cir. 1997) (where the Ninth Circuit held that adequate representation requires "that counsel 'vigorously and tenaciously [protect] the interests of the class.'"), *vacated on other grounds*, 179 F.3d 641 (9th Cir. 1999).

[307] Patrick Woolley, "Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages" (2010) 58 Kansas L. Rev. 921 at 928.

[308] *Manual*, *ibid*.

[309] *Caputo v. Imperial Tobacco* (2005), 74 O.R. (3d) 728 at para. 41 (Sup.Ct.J.).

with class representatives and with their clients – the class members.[310] Second, they must protect the interests of the class, "even in circumstances where the class representatives take a position that counsel considers contrary to the interests of absent class members."[311] Third, they must fulfill the "duty of candor" they owe to the court to disclose all information relevant to the fairness determination.[312] Class counsel may be removed from the action if they do not act in the best interests of the class.[313]

Accordingly, to the question posed above, "can class counsel properly act as fiduciaries of absent class members", I answer a mitigated "yes". They are indeed required by the law of three of the focus jurisdictions (but not Quebec's), to act as fiduciaries of class members, including absent ones. But how can they truly act as fiduciaries when they do not generally know who their client is or what his interests are? Accordingly, I propose a reformed duty, as further discussed below, in Subsection d., which instead shares the burden of protection of the class members with the class representative.

c. The Class Representative: A Fictitious Spokesperson of the Class Members?

Since class actions are an exception to the right to litigate individually, every individual in a proposed class action must be represented

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[310] See e.g. *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d. 501 at 508 (5th Cir. 1981) ("the client in a class action consists of numerous unnamed class members as well as the class representative.")

[311] *Manual, supra* note 12 at para. 21.641. Also see *Lau*, *supra* note 136.

[312] *Manual, ibid*.

[313] *Richard, supra* note 276 at para. 41.

adequately before the courts. The identity of plaintiffs and class representatives is important in that context as it "legitimize[s] the disposition of class members who are not before the court."[314] Indeed, the representative plaintiff is, at least theoretically, "'the face' of the action being brought on behalf of all class members."[315]

When a member of the proposed group of plaintiffs comes forward and asks to be a class representative, he or she is required to demonstrate his skills, attitude, motivation, interest and financial means to pursue the action and defend the other class members' interests. Hence, the named class action representative has an important role, and as will be further discussed below, one that begins at the time of filing of the class action. As such, the presence of an adequate, "genuine" claimant

> [r]educes frivolous claims, acts as a check and balance to the excesses of entrepreneurial law firms, provides a voice to protect the interests of the absent class members, and goes some distance to ensuring that the access to justice and behaviour modification provided in the Act make a meaningful contribution to both private and social good.[316]

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[314] *Fantl*, *supra* note 266 at paras. 65ff.

[315] Mulheron, *supra* note 38 at 275.

[316] Fantl, *supra* note 266 at para. 63 (and 65).

Quebec's Article 1003(d) C.P.C. requires the representative to be able to "represent the class *adequately*".[317] This standard is interpreted liberally by the Quebec courts, such as to require a sufficient interest to sue, competence, and no conflicts of interests with the class members.[318] As such, the Quebec representative must have reasonably inquired and estimated the projected number of class members, and must be able to organize and direct the class action procedure.[319]

The requirement of adequacy of the class representative is also fundamental in the target common law jurisdictions. In fact, the common law provinces of Ontario and British Columbia have a stricter standard of representation than Quebec's, at least statutorily. They require a representative who:

> (i) will fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding and notifying class members of the action; and

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[317] Art. 1003 (d) C.C.P. Quebec also requires that the representative be represented by a lawyer: art. 1049 C.C.P. The same is required in Ontario, notably in Rule 15.01(1), Ont. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("Ont. R.C.P.").

[318] *D'Amour v. Bell Mobilité inc.*, EYB 2010-168844 (Qc. Sup. Ct.), citing *Bouchard c. Agropur*, *supra* note 41. Also see Lafond, « Le recours collectif », *supra* note 74 at 419.

[319] *Association des consommateurs du Québec v. W.C.I. Canada Inc.* (24 October 1997), Montreal, 500-09-002230-969, J.E. 97-2064 (C.A.).

> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.[320]

Hence, the representative does not have to be the "best or most typical candidate"[321], but he or she must have a good, general understanding of the class action procedure and of the case at stake, notably to be able to instruct counsel.

U.S. Federal Rule 23(a)(3), by contrast, requires adequacy of representation "at all times", because the final judgment will bind all class members, according to constitutional due process.[322] Interestingly, it also requires that the representative's claims or defences be "typical of the claims or defences of the class".[323] That requirement has not been expressly included in the legislative regimes of the target common law provinces of Ontario, British Columbia or Quebec.

Certain authors have noted that adequacy of representation by the representative appears to be scrutinized more closely by the U.S. courts than by the Canadian courts.[324] Canadian courts, nonetheless, have

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[320] Branch, *supra* note 140 at para. 4.290. In British Columbia, the representative must be a resident of the province: B.C.C.P.A., s. 2(4).

[321] See e.g. *Abdool v. Anaheim Manag. Ltd.* (1995), 121 D.L.R. (4th) 496, 21 O.R. (3d) 453 (Div. Ct.).

[322] *Shutts*, *supra* note 82 at 812; *Gonzales v. Cassidy* 474 F.2d 67 (5th Cir. 1973) at 74 ("Due process of law would be violated for the judgment in a class suit to be *res judicata* to the absent members of a class unless the court applying *res judicata* can conclude that the class was adequately represented in the first suit." (citing *Hansberry*, *supra* note 37 at 61)); *Epstein v. MCA, supra* note 218 at 116. But see *Re Four Seasons Securities Litig.*, 502 F.2d 834 at 843 (10th Cir. 1974).

[323] F.R.C.P. 23(a). Also see footnote 41 above.

[324] Branch, *supra* note 140.

similarly scrutinized adequacy of representation strictly and refused to certify cases where the representative plaintiff appeared not to understand the case nor want to act on behalf of the class.[325] Generally, Canadian common law courts and U.S. federal courts will review the motivation, knowledge and financial capacity of the representative, as well as the competence of his or her counsel.[326] They will also evaluate whether he or she has a cause of action against every defendant.[327]

Properly evaluating the adequacy of representation by the representative is considered fundamentally important by the courts, and "at the heart of the *rationale* supporting class actions",[328] primarily because this representative has responsibilities akin to that of a fiduciary to other class members – named or unnamed, present or absent.[329] Therefore, in

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[325] See e.g. *Chartrand v. General Motors Corp.*, 2008 BCSC 1781.

[326] Branch, *supra* note 140 at paras. 4.380-390; *Dutton*, *supra* note 14 at para. 41; Woolley, "Collateral Attack", *supra* note 307 at 929-30. See also on adequacy of representation, Robert H. Klonoff, "The Judiciary's Flawed Application of Rule 23's 'Adequacy of Representation' Requirement" (2004) 2004 Mich. State L. Rev. 671 at 678 (where the author indicates that 228 courts, during the 10-year period studied, held that class representatives "were *per se* adequate because their claims did not conflict with those of the class"); Patrick Woolley, "Rethinking the Adequacy of Adequate Representation" (1997) 75 Tex. L. Rev. 571 ["Woolley, Adequacy"].

[327] *Ragoonanan*, *supra* note 41; *Imperial Tobacco*, *supra* note 41; *Bendall v. McGhan Medical Corp.* (1993), 106 D.L.R. (4th) 339 (B.C., Gen. Div.). In the U.S. federal class action regime, the Ninth Circuit has held, in *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 at 462 (9th Cir. 1973), that the representative plaintiff cannot represent "those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury". Hence, *La Mar* clarified the typicality requirement to "prevent a representative from instituting a class action against a single defendant, and an unrelated group of defendants who have engaged in conduct closely similar to that of the single defendant, on behalf of those injured by all the defendants sought to be included in the defendant class." *Newberg on Class Actions*, *supra* note 35 at para. 3.18, p. 392.

[328] *Johnson v. Shreveport Garment Co.,* 422 F.Supp. 526 at 531 (W. D. La. 1976).

[329] *Poulin v. Ford Motor Co. of Canada*, [2008] O.J. No. 4153 (Sup. Ct. J.) ["*Poulin*"]; *Newberg on Class Actions, supra* note 35 at § 5:23 ("the class representative is […] charged with

deciding for the class as a whole, the representative is required to consider "the interests of the class ahead of her personal interest"[330], in line with his or her duty of "loyalty" to the potential class.[331]

The class proceedings statutes of the four focus jurisdictions do not otherwise describe the legal responsibilities and ethical obligations of the class representative toward class members, especially at the settlement stage. In the American treatise *Newberg on Class Actions*, the imprecise nature of the relationship between these actors permeates:

> The duties that class representatives owe to absent class members have not often been discussed by the courts expressly, nor does certainty exist as to the precise nature of the relationship between the class representative and absent class members. What is clear is that the imperative of protecting class members' interests subjects the relationship of

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duties to the class that have been characterized by several courts as *fiduciary* in *nature*.") (italics added); 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.25 (3d ed, 1997-...) ["*Moore's Federal Practice*"] ("The class representative acts as a fiduciary for the entire class."); *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326 at 331, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (class representatives must "represent the collective interest of the putative class" in addition to their own interests); *Maywalt, supra* note 282 at 1077 ("Both class representatives and class counsel have responsibilities to absent members of the class."); *Sondel v. Northwest Airlines Inc.,* 56 F.3d 934 at 938-39 (8th Cir.1995).

[330] See e.g. *Maywalt v. Parker & Parsley Petroleum Co.,* 864 F.Supp. 1422 at 1430 (S.D.N.Y. 1994) (where the court approved the proposed settlement despite objections by the representatives: "the named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands") (quoting *Parker v. Anderson, supra* note 282 at 1211 (5th Cir. 1982)); *Newberg on Class Actions*, *supra* note 35 at § 5:23 ("When a class complaint is filed, the class representative must always act for the best interests of the class, even when individual interests might suggest otherwise.").

[331] Mullenix, "Taking Adequacy", *supra* note 23 at 1703-12.

> representative counsel with class members to substantial scrutiny by the court, particularly when a financial interest by counsel in the action is implicated or counsel has significant control over the generation of fees.[332]

Interestingly, the British Columbia Supreme Court in *Richard v. British Columbia*[333] addressed this relationship between class counsel and the class representatives and members, and clarified the law in that respect. The Court summarized the responsibilities of the class representative as follows:

> 1. The representative plaintiff has the mandate to act in the best interests of the class as a whole.
>
> 2. The representative plaintiff has a significant role to play in the proceedings after certification. He or she acts in the class' best interests by directing litigation, instructing class counsel and authorizing settlement. [...]
>
> 4. Class counsel [...] has a solicitor-client relationship with the representative plaintiff and owes the duties and obligations that arise as a result of that

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[332] *Newberg on Class Actions*, *supra* note 35 at para. 15.03.

[333] *Richard, supra* note 276 at para. 42.

> relationship to the representative plaintiff. This includes a duty of loyalty [...]
>
> 5. [...] class counsel [...] may not ignore the wishes of the class representatives in making fundamental litigation decisions [...][334]

Accordingly, the representative must act in conjunction with class counsel in making the most adequate and appropriate decisions in the class members' interests. This fundamental responsibility toward class members – named *and* unnamed or absent[335] – begins with "the very act of filing a class action" and may not end by a payment of their claim forced upon them.[336] Upon certification, the representative has "authority to instruct class counsel, direct the litigation, participate in discoveries, and authorize settlement (subject to court approval)."[337] In sum, in a class settlement context, the representative must act in the best interests of the class as a whole in making the decision to settle and in negotiating the terms of the deal.

How good or appropriate must the representative's decisions be? How must one evaluate a representative's decision-making on behalf of the class? On this specific issue, the Ontario Supreme Court has held in *Fantl*

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[334] *Richard*, *supra* note 276 at para. 42.

[335] See e.g. *Maywalt, supra* note 282 at 13 ("Both class representatives and class counsel have responsibilities to absent class members of the class [...]").

[336] *Coleman, supra* note 269 at paras. 30-36.

[337] Branch, *supra* note 140 at para. 7.400.

v. Transamerica Life Canada[338] that the class representative is required to act "adequately" on behalf of the class.[339] The class representative's decision was upheld, in that case, after having been evaluated according to a test of "adequacy not of superiority", [nor] of what is in the best interests of the class or proposed class."[340] In that case, the law firm originally retained by the representative split in two, and the representative chose one of the two new firms to represent him, but not the firm lead counsel on file had chosen to partner with. Perell J. held that a representative plaintiff has the right to choose counsel and replace counsel of record, but that this decision needs to be made in accordance with his duty to the potential class.[341] The divisional court agreed.

Thus, class representatives must act "adequately", and thoroughly consider the interests of the other class members. Should this "adequate representation" be rewarded by a monetary compensation? Correspondingly, what impact may this potential monetary compensation have on the adequacy of representation?

Compensation is not only ideal but necessary to ensure full and competent participation and adequate representation by the representative. There are few incentives for competent representatives to otherwise become involved in class actions. The objective and form of this compensation, however, has the potential of creating a conflict of interest between the personal interests of the representative and the more collective interests of the class members.

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[338] *Fantl, supra* note 266.

[339] *Ibid*, notably at para. 65.

[340] *Ibid* at para. 108.

[341] *Ibid*.

In Quebec, the Court of Appeal has held that if there is no provision in the settlement agreement explaining the form of compensation to be afforded to the representatives, courts do not have the competence to award such monies.[342] The Superior Court has nonetheless later approved settlements that warded cash rewards to the representative.[343]

In the common law provinces, by contrast, the courts went from allowing such forms of compensation to the extent that the representative's involvement in the case was of "of special significance"[344], to allowing "modest awards" without a need for such a special involvement.[345] Of course, compensation to the representative plaintiff will only be adequate if the representative has fulfilled his duties and "vigorously and capably [prosecuted] the interests of the class".[346] Canadian courts are nonetheless generally reluctant to award such fees, stating that while "each case turns on its facts […], it is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action."[347]

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[342] *Association de protection des épargnants et investisseurs du Québec (APEIQ)* c. *Ontario Public Service Employees' Union Pension Plan Trust Fund*, [2008] R.J.Q. 1540 (C.A).

[343] *Dallaire c. Eli Lilly Canada inc.*, 2010 QCCS 2760, para. 21; *Association des consommateurs pour la qualité dans la construction c. Flamidor inc.*, 2008 QCCS 4848, para. 26-28.

[344] See e.g. *Parsons v. Coast Capital Savings Credit Union,* 2009 BCSC 330.

[345] *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311 (where court awarded 3500$ to stressed and strained class representative). Also see *Bodnar v. Cash Store*, [2010] B.C.J. No. 192; *Casavant v. Cash Money Cheque Cashing Inc.*, 2010 BCSC 148.

[346] *Parsons*, *supra* note 163 at para. 25, cited again in the very recent case of *Richard v. British Columbia*, 2010 BCSC 773 at para. 47 (where the court awarded 10000$ to the representative).

[347] *McCarthy*, *supra* note 197 at para. 20.

In the United States, judges are given broad discretion in deciding whether to allow bonus or incentive cash awards, and in fixing the amount of such an incentive award.[348] When evaluating whether and how much to award to the class representative, courts will notably evaluate how involved the representative was in the case, how he has acted on behalf of the class, and how much time and effort was spent in pursuing the class litigation.[349]

In this section's title, I asked whether class action representatives could properly be considered as real representatives of class members or whether they instead should be considered as fictitious representatives or "figureheads", as some have argued.[350] Class representatives are required to act on behalf – and in the interests of – class members, but they mainly act through class counsel, who are also fiduciaries for the class. American scholars have argued that class action representatives are imperfect agents of the class members, and that the adequacy of representation standard is not properly evaluated by the judges.[351] I personally believe that representatives are often fictitious and maintain a very minimal involvement with the case. Accordingly, how can the roles and responsibilities of these representatives be reformed?

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[348] See e.g. Theodore Eisenberg and Geoffrey P. Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study", 12-07-2005, *Cornell Law School legal studies research paper series*, Research Paper No. 05-037, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869308>.

[349] *Ibid*.

[350] See e.g. Jean Wegman Burns, "Decorative Figureheads: Eliminating Class Representatives in Class Actions," (1990) 42 Hastings L.J. 165 ["Burns, Decorative Figureheads"].

[351] See Klonoff and Woolley, Adequacy, notably, *supra* note 326; and Mullenix, *supra* note 23.

d. Reforming the Roles of Class Representatives and Class Counsel

A panoply of legal and ethical issues arise from the discussion of the relationships, roles and duties of two principal class action settlement actors, the class representatives and class counsel. Among other questions, I ask:

- When does the attorney-client relationship begin between class counsel and the class representatives?

- Who is class counsel's client?

- What kind of relationship do class counsel have with their clients, and what responsibilities are generated through that relationship, especially toward each individual client?

- How must class counsel properly communicate with their clients, such that "truly 'informed' consent is given about both process choices and settlement possibilities"[352]?

I hereby propose reform hypotheses that address the roles of the two settlement actors discussed herein and seek to achieve the following two objectives:

- Provide information through a more elaborate description of the roles and responsibilities of these actors; and

- Clarify their roles and responsibilities in ways that render the applicable law more predictable and consistent in that regard.

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[352] Menkel-Meadow, "Ethics", *supra* note 13 at 1206.

In addition, the reform hypotheses proposed herein are consistent with two of the principles of governance listed above applicable to class action settlement practices: adequacy of representation, and information and transparency of the legal and judicial practices. Consent of the class members is expressed through the representations of their adequate representatives. Moreover, optimal transmission and exchange of information will, in my view, assure fairer practices by these representatives and will better assist the judges in their decision to approve or deny proposed settlements. Naturally, dialogue and communication between counsel and clients should also be prioritized.

The preliminary review of the positive law has revealed two problematic issues regarding the roles and responsibilities of class counsel and class representatives. First, the judicial inquiry into adequacy of representation by counsel and the class representatives is inadequate and insufficient. Adequate representation should instead be thoroughly scrutinized, and at all stages of the litigation, including settlement. Second, the roles and responsibilities of class counsel and class representatives should be further elaborated to be made clearer, and more consistent and predictable.[353]

Adequate representation is at the foundation of class action litigation. If there are no representatives adequately and properly representing the interests of the class, class members cannot ultimately be bound by the outcome of the litigation.[354] While there are important obstacles to

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[353] See e.g. Issacharoff & Nagareda, *supra* note 218 at 1695ff. (where they refer to "class conflicts").

[354] Mullenix, "Taking Adequacy", *supra* note 23 at 1696. Also see text of thesis accompanying my footnotes 37 and 218ff.

adequate representation, which are not all discussed herein[355], suffice it to say that the adequacy of representation requirement is so essential that it should be "satisfied at all stages of a class action".[356] In this peculiar context, the judge has the responsibility for "monitoring the attorney-client relationship"[357], and specifically, this adequate representation.

As such, my first hypothesis is that the law should be reformed to provide that the qualification of "adequacy" of representation should be made very carefully, not just at the certification hearing, but at the settlement approval stage. Indeed, as aptly stated by Professor Linda Mullenix,

> [c]ourts pay lip service to the concept of adequate representation but fail to robustly engage in any meaningful inquiry to establish the existence of such adequate representation. For judges, the adequacy inquiry usually is the least-rigorously examined requirement for certification, […] Instead, courts routinely wave their blessings over class counsel and proposed class representatives and presumptively make findings of adequacy

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[355] See, for more details, Coffee, "Class Wars", *supra* note 6 at 1442-46; John C. Coffee Jr., "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action" (1987) 54 U. Chi. L. Rev. 877; John C. Coffee Jr., "Understanding the Plaintiff's Attorney: The Implication of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions" (1986) 86 Colum. L. Rev. 669.

[356] *Newberg on Class Actions*, *supra* note 35 at para. 3.21, at 408.

[357] Molot, *supra* note 30 at 48.

> on nonexistent or scant factual showings.[358]

However, I disagree with Mullenix's argument that "courts need to assess the adequacy requirement at the outset of the litigation (at the front end) and not during the development of the litigation or at the time of settlement (the back end)".[359] I instead believe that adequacy must be evaluated at the time of settlement approval. First, class members must be duly protected by the courts and one form of protection is proper scrutiny of adequate representation. Second, evaluating adequacy at that stage is convenient, even ideal. It is a time when substantive and procedural components of the settlement are being discussed, and all major settlement parties are present. Information about adequacy of representation is easily obtainable. At this stage, if the representative is found not to be adequate, the courts can then suspend the action until a new representative is found and designated.

Hence, in addition to the existing caselaw requirements to adequacy of representation, the law should be reformed to provide that the class representative is required to demonstrate that he a) has participated at the settlement negotiations, b) understands the deal, c) has contacted potential class members and discussed their interests in the case and settlement.[360]

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[358] Mullenix, "Taking Adequacy", *supra* note 23 at 1692. (Mullenix interestingly explains that "[a]dequacy standards need to be tied to their due process underpinnings and to due process concerns of representational litigation. Thus courts need to go beyond the simple inquiry of whether conflicts of interest exist, either as between counsel and the absent class members or as between the representatives and the absent class members." *Ibid* at 1687).

[359] *Ibid* at 1733.

[360] Mullenix's approach is similar, but larger-framed and more aggressive. See *ibid* at 1733, where she argues in favour of "more meaningful involvement of the class representatives, more rigorous judicial scrutiny of proffered class counsel and class representatives, and more effort on the part of everyone involved in class action

Of course, it seems natural to underscore that he should also appear to "knowlingly consent to undertaking the role of fiduciary for the class."[361]

As for class counsel, they too should have to demonstrate, in addition to the existing caselaw requirements, that they have adequately represented the class members during the settlement negotiations, notably by subjecting them to testimony about the conduct of these negotiations and eventually, cross-examination by objectors.[362] Counsel should consider the adequacy of the class representative "seriously", taking "all measures to ensure an adequate class representative's presence in the class."[363] They should also be required to demonstrate that "the class representative is acting as an independent fiduciary and that he or she has not ceded control of the litigation to the attorneys."[364]

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litigation." Mullenix further argues that "[...] class representatives should be actively involved in the development and progress of the litigation. This means that counsel should furnish class representatives pleadings, motions and papers in the action as they are generated and before counsel files documents with the court or opposing counsel. Counsel should involve the class representatives in decisionmaking regarding the class action and should educate the class representatives as to the nature of the claims that are pleaded, possible defences to the claims, and the damages aspects of the litigation. […] Counsel need to prepare and make the class representative available for deposition, trial, and even settlement conferences. Needless to say, class representatives need to be informed about ongoing settlement negotiations and the nature and content of possible settlement agreements." *Ibid* at 1740. I am conscious that the more responsibilities are placed on the head of the representative, the less likely they are to wish to participate, however.

[361] *Ibid* at 1739.

[362] Donald Puckett first suggested requiring this testimony and cross-examination in Puckett, *supra* note 34 at 1275. Mullenix also argues in favour of live testimony by the representative. See Mullenix, *ibid* at 1742.

[363] Mullenix, *ibid* at 1739.

[364] *Ibid* at 1687.

Accordingly, not only must the requirements and standards of adequacy of representation by counsel and by the representatives be made clearer,[365] but their roles and responsibilities should similarly be elaborated upon, to ultimately encourage more consistency and predictability to the law of the four jurisdictions.

To begin with the role of class counsel, Quebec courts have stated that class counsel represent only the class representative, at all stages of the class action. This solution requires that the class representatives be fundamentally adequate and responsible in representing the absent members' interests, as they will be the only ones acting on behalf of the members. In the common law target jurisdictions (including the U.S. federal courts), class counsel have a responsibility to class members both before and after certification, albeit an unclear one before certification. In the U.S., the responsibility tends to be fiduciary in nature. In Canada, it relates to a sort of duty of protection of the absent class members, which is, again, very unclear.

Given these divergences in the role of class counsel, the professional responsibility and ethics rules should first be clarified and be adapted to the class action settlement review context. The ethical responsibilities of class action lawyers were created to fit the context of traditional, non-class litigation, and therefore either give "little guidance for courts or class action attorneys", or "seem impractical in a class action setting"[366], hence the need for reform. In fact, the majority of legal ethics rules cannot truly

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[365] *Ibid* at 1734 (where she advocates "articulate and meaningful standards for the assessment" of the adequacy requirement, and encouraging courts to "engage in meaningful measures to implement these adequacy standards.")

[366] Mohsen Manesh, "The New Class Action Rule: Procedural Reforms in an Ethical Vacuum" (2004-5) 18 Geo. J. Leg. Ethics 923 at 944.

apply to class action litigation,[367] because "the settlements of mass torts raise ethical issues of a different magnitude and quality than those raised by the idealized version of individual attorney-client representation on which the current rules are based."[368] The class action context "alters the lawyer-client relationship that exists in what may be perceived as the 'traditional', single client-single lawyer, one-to-one situation.[369]

The U.S. *Model Rules of Professional Conduct* require, in their Rule 1.8(g),[370] that in aggregate settlements, the "clients"' informed consent be given, in writing[371], after the terms of a proposed settlement are properly disclosed

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[367] *Ibid*, at 945, citing Menkel-Meadow, "Ethics", *supra* note 13 at 1172 ("The current ethical rules on conflicts of interest, limitation of practice, and ethics in negotiation and litigation […] were not drafted with the special issues of mass tort class action settlements in mind, and do not, in my view, provide adequate guidance for how these issues should be resolved. Our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for 'aggregate justice'".) Menkel-Meadow adds, at the same page, that "the settlement of mass torts raise ethical issues of a different magnitude and quality than those raised by the idealized version of individual attorney-client representation on which the current rules are based." Also see *In re Agent Orange Prod. Liab. Litig*., 800 F.2d 14, 19 (2d Cir. 1986) ("[T]he traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation."); *In re Corn Derivatives Antitrust Litig*., 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) ("[C]ourts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context [...]").

[368] Menkel-Meadow, *ibid* at 1172.

[369] Ricciuti, *supra* note 16 at 827. Ricciuti further explains that "In traditional, one-to-one litigation, the client decides the fundamental issues in the suit –whether it will continue at any point, whether it will settle, the amount of settlement, etc. In the class context, however, this formal distinction is blurred." *Ibid* at 828.

[370] *Model Rules of Prof'l Conduct* R. 1.8(g) (2002), online: http://www.abanet.org/cpr/mrpc/rule_1_8.html. Also see *Model Code of Prof'l Responsibility* DR 5-106 (1980); Nancy Moore, "The Case against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits" (1999) 41 S. Tex. L. Rev. 149.

[371] Rule 1.01 of the Model Rules, *ibid*, indicates that written consent "denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically

to them. This is an impossible burden in the great majority of class action cases. Nonetheless, the Comments to the Model Rules interestingly provide that even if lawyers cannot have a traditional attorney-client relationship with each member of the class, procedural requirements of notice must be carefully met and adequacy of representation must exist.[372] In the end, the model rules are ill-adapted to the class action context. They should instead precisely address the duties of class counsel, whom, at the time being, have "almost unfettered control over the action."[373]

A better solution is to hypothesise that before certification, class counsel should be held to represent the class representative only. We have seen that the traditional attorney-client relationship does not work in the class action context before the class action is certified. Class counsel simply cannot evaluate specifically what the interests of projected class members may be before certification. Furthermore, they cannot truly be "in contact" with their "clients" to discuss potential decisions regarding the proposed settlement and obtain their explicit consent. Class counsel must, nonetheless, have the interests of the potential class members in mind,

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associated with a writing and executed or adopted by a person with the intent to sign the writing."

[372] Comment to Model Rules, Para. 13 at http://www.abanet.org/cpr/mrpc/rule_1_8_comm.html ("before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.") Also see Threadcraft, "The Class Action Settlement: When the Good Can Become the Bad and the Ugly" (2001) 25 J. Leg. Prof. 227.

[373] Ricciuti, *supra* note 16 at 829.

anticipate these interests and consider these interests when making decisions on behalf of the representative and the class.

Hence, a more realistic approach is to provide that before certification, class counsel have an attorney-client relationship with the representative, but that they nonetheless have a duty to closely monitor the relationship between the class action representative and class members in such a way as to be able to anticipate and ascertain the members' interests during settlement negotiations and at later stages.

After certification, class counsel are formally counsel for the certified class, and they then have a proper attorney-client relationship with the representative of course, and with the class as a client. This requires that counsel diligently represent the class and ensure that all decisions – including settlement ones – are made in its best interest. How can class counsel properly represent this "client", the "class", when contact with each and every one of them is impossible in practice? By contacting, with the help of the representative, several of the class members, to "gauge class opinion"[374], by discussing the settlement agreement and its provisions to ensure that a) a sufficient understanding of the agreement is reached by a significant proportion of "key" class members[375] and b) that their interests are adequately provided for in the agreement (i.e., the

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[374] Ricciuti, *ibid* at 840, uses this expression and adds that this permits counsel to "determine the existence or the extent of any class cleavages generated during the course of the litigation or by the settlement itself.")

[375] The "key" members of the class would presumably be members who have clearly been diagnosed with the symptoms at stake, for example, or who are known by the public as having suffered the damage at stake, or again, members of the class who, for example, are named in the lawsuit. This approach is similar to Ricciuti's suggestion to name a consultative unit, formed of actual class members, to permit class counsel to seek input in settlement proceedings from a group of members actually reflecting the composition of the class. Ricciuti, *ibid* at 851ff. Also see Shapiro, *supra* note 22 at 959 (as he proposes that there be representative groups of claimants to limit potential abuses by counsel).

interests of the significant proportion of key class members). Counsel should then ask, in light of the proposed settlement: "could this provision of the agreement prejudice the absent class members in any way, and if so, is that potential prejudice minimal considering the benefits afforded by the settlement?"

As for class action representatives, their role is fundamental but unclear and yet underdeveloped in the North American doctrine and caselaw. I believe that the law should be reformed to require that they act as fiduciaries for the class, at all stages of the action. Indeed, they have a duty to protect and represent the unnamed class members before and after certification. Before certification, the duty to represent the absent members may, in practice, be fulfilled by contacting as many members as possible, or at least a "significant proportion of *key* class members", and discussing the action and the proposed settlement with them. After certification, representation should continue in the same way, and include communication with class members. The adequacy of representation should be tested at the hearing by examining the representative, independent of the intervention of class counsel. The limits and conditions of representation should be clearly delineated, however, to ensure that members are not discouraged from acting as class representatives.

The law should hypothetically be reformed to further provide that representative and counsel have a shared responsibility toward the class members in ensuring the fairness of the proposed settlement. This view is consistent with the *American Law Institute*'s *Principles of the Law of Aggregate Litigation*[376], which provide that all the class members' fiduciaries share a responsibility at the settlement stage: "[…]the

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[376] *ALI Principles*, 2010, *supra* note 79.

responsibility for ensuring the fairness of the settlement rests with [those having a fiduciary obligation to the absent class members:][377] the class representatives, class counsel and the court."[378] Hence, the law should be reformed to require serious judicial scrutiny of the adequacy requirement not just at the beginning of the class action litigation (and certification decision), but at the time of settlement. Class counsel have a fiduciary duty toward class members that must be enforced at all critical stages of the action.

This shared responsibility to ensure fairness is justified by the need for added protection of class members in the class action context. Indeed, these members are bound by the outcome, whether they were made aware of the class action's existence – and of its settlement – or not, unless they opt out. Hence, encouraging class representatives and counsel to be more aware of their responsibilities of protection toward class members is crucially important. Class representatives, who have been criticized for not adequately fulfilling their duties of representation,[379] are reminded of the fundamental role they play in the class action.

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[377] The American Law Institute, *Principles of the Law of Aggregate Litigation*, Discussion Draft No. 2 (April 6, 2007), at 227 ["*ALI Principles*, Draft #2"].

[378] *ALI Principles*, *supra* note 79, at para. 3.05, Comment c.

[379] See notably: Burns, *supra* note 350.

II. THE ROLES AND RESPONSIBILITIES OF CLASS ACTION SETTLEMENT JUDGES[380]

Judges involved in class action cases have a tremendous responsibility toward class members and toward the public in general. They are asked to adjudicate the rights of numerous plaintiffs; importantly, the rights of absent or unnamed ones, according to their presumed interests. Judges involved in the review and approval of class action settlements have an even more important role. They are presented with a "contract of settlement" or "contract to settle"[381] that the settling parties have agreed to, and are asked to approve this contract integrally. They must evaluate whether it is in the best interests of all class members – including absent or unnamed ones, in a context where there is no room for disagreement and where approval is, implicitly, strongly encouraged.

An important revolution has taken place in civil litigation world-wide, such that a new role has emerged for judges. This revolution has required that courts "reconsider and adapt old principles and structures of civil litigation which have proven unsuitable to [their] new role."[382] At present, the role of the reviewing judge at the class action settlement approval stage remains unclear and unsuited to the modern class action reality. It

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[380] On this specific topic, I published one background article to this chapter: Catherine Piché, "Judging Fairness in Class Action Settlements" (2010) 28 Windsor Y.B. Access Just. 111. This background article reproduces large portions of and/or is largely similar to this subsection.

[381] See e.g. Nagareda, "Mass Torts", *supra* note 69.

[382] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Oxford University Press, 1989) at 308 ["Cappelletti, Judicial Process"].

must be revisited in light of the contemporary civil justice and class action law system, and its four paradoxes.

In this subsection, I critically discuss the role of the settlement judge as it is described in the existing caselaw and doctrine, before hypothesing a revised, three-part role for judges involved with the review and approval of class action settlements. Ultimately, the judicial role I herein propose encourages traditionally adversarial judges to favor an inquisitorial approach when considering proposed settlements. Instead of relying solely on counsel's arguments at the fairness hearing, it is suggested that these judges base their decisions to approve or deny proposed settlements on facts they will have actively elucidated for themselves by examination of the parties and witnesses. Furthermore, this revised role considers the judge to be a protector of the tri-dimensional relationship between the class action settlement actors, as opposed to how the doctrine characterizes him, as a protector of absent class members.

a. Four Paradoxes of the Contemporary Civil Justice System

i. A First Paradox: In the Face of Increasingly Complex Litigation, Trials Appear to Be Vanishing

A new litigation landscape has emerged in the last thirty years in North America. Globalization has changed civil cases, with larger numbers of parties and factual issues, increasingly voluminous court files and complex legal arguments.[383] When, decades ago, Mauro Cappelletti

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[383] Mauro Cappelletti, "La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile)" (1975) 27 Rev. Int'le de Droit Comparé 571 ["Cappelletti, La protection"]. For my background article discussing the four paradoxes, see Catherine Piché, "A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness" (2010) 41:1 Ottawa L. Rev. 1 ["Piché, Reappraisal"].

characterized our society as a "'mass production – mass consumption' civilization, [with a] massification feature [that extends to the economy, social relationships, feelings and conflicts]",[384] he argued that the law, as "an instrument of social order, [needed to respond to this phenomenon and rise of] meta-individual [social interests by generating] new social, collective, 'diffuse' remedies and procedures."[385] Around the same time, Arthur Miller similarly characterized the then-existing legal landscape as the "Big Case Phenomenon",[386] a "byproduct of the mass character of contemporary American society and the complexity of its substantive regulations".[387] Miller further emphasized that this Phenomenon applied to all litigation in general, including class action litigation.[388]

In the United States, this contemporary development of greater complexity of the civil cases has been accompanied by larger federal court civil caseloads.[389] These caseload increases appear to have held relatively steady in very recent years: "From 2006 to 2007, total filings of civil and criminal cases in the U.S. district courts [dropped] by only 481 cases to 325,920. […] Civil filings in the U.S. district courts fell slightly, dropping

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[384] Mauro Cappelletti, "Vindicating the Public Interest Through the Courts: A Comparativist's Contribution" (1975-76) 25 Buff. L. Rev. 643 at 645-46 ["Capelletti, Vindicating"].

[385] *Ibid* at 647-48.

[386] Miller, "Frankenstein Monsters", *supra* note 172 at 668 (where the author argues that the "traditional notion of civil litigation as merely private dispute resolution is outmoded.")

[387] *Ibid*.

[388] *Ibid*.

[389] William F. Shughart, II & Gokhan R. Karahan, "Study of the Determinants of Case Growth in U.S. Federal District Courts," Final Report (February 2004), online: http://www.ncjrs.gov/pdffiles1/nij/grants/204010.pdf at i.

less than 1 percent (down 2,034 cases) to 257,507."[390] And in the federal courts, the number of cases grew in civil, criminal and bankruptcy areas during the year 2009.[391] In state courts, civil filings increased modestly between 1996 and 2005.[392]

Canadian jurisdictions have similarly experienced their civil cases getting increasingly more complex.[393] Not all of them, however, have experienced concurrent increases in civil caseloads. Their experience varies according to the jurisdiction and court level:

> In Alberta, statistics over the last three years show that the number of actions commenced has declined. In British Columbia, civil filings have declined from 58,189 in 1996 to 48,404 in 2005. In contrast, in Ontario, the 2004/05 Annual

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[390] U.S. Courts, Press Release (March 11, 2008), online: http://www.uscourts.gov/News/NewsView/08-03-11/Caseload_of_Federal_Courts_Remains_Steady_Overall.aspx. Also see U.S. Courts, Judicial Caseload Indicators (2009), online: http://www.uscourts.gov/News/Viewer.aspx?doc=/uscourts/News/2010/docs/JudicialBusiness2009.pdf.

[391] U.S. Courts, Press Release (March 16, 2010), online: http://www.uscourts.gov/news/NewsView/10-03-16/Most_Federal_Court_Filings_Increase_in_2009.aspx.

[392] "Examining the Work of State Courts: A National Perspective from the Court Statistics Project" (2007) online: http://www.ncsconline.org/D_Research/csp/2006_files/EWSC-2007WholeDocument.pdf, at 17.

[393] See e.g. Robert M. Goldschmid, "Discussion Paper: Major Themes of Civil Justice Reform" (January 2006), online: http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_paper_01_18_06.pdf, at 1, fn. 3 ("There is some data indicating that trials may be becoming more complex. A study by the BC Supreme Court Chief Justice Donald Brenner showed that between 1996 and 2002, while the number of cases going to trial reduced by half, average trial length doubled.").

> of the Court Services Division shows that there has been an increase in the number of civil cases commenced between the years 2000/01 and 2004/05 […] In Québec, a decline in the number of civil actions (excluding family law matters, where numbers have remained relatively constant) has been observed since the 1970s. Since 2003, the number of actions appears to have stabilized. Altogether, around 40% of the public give up their right to take legal proceedings. […][394]

In fact, while Quebec civil filings have tended to generally decrease in the last decade, the number of civil cases filed yearly in the Quebec Superior Court has risen by 36% from 2004 to 2010.[395] In addition, the length and complexity of its civil cases appears to have grown in the last few years.

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[394] Margaret A. Shone, "Into the Future: Civil Justice Reform in Canada – 1996 to 2006 and Beyond" (December 2006) online: http://cfcj-fcjc.org/docs/2006/shone-final-en.pdf. For more precise legal statistics from Quebec, see Report from Hubert Reid dated January 31, 2008, online: http://www.wilsonlafleur.com/wilsonlafleur/wl-images/cat/Memoire.pdf (in which he reflects that since 1977, the number of cases filed in Quebec courts has declined by 55%).

[395] Statistics given by Justices André Prévost and Louis Lacoursière from the Quebec Superior Court of Justice on October 28-29, 2010, at the annual Quebec Class Action Conference, organised by the *Barreau du Québec*. As for class action cases specifically, the number of open cases per year varied from 43 (2008-2008) to 36 (2008-2009) to 40 (2009-2010). Interestingly, Justice Perell of the Ontario Court of Justice indicated on October 29, 2010, at this same conference, that in Ontario, the number of class action filings per month has "substantially" declined, going from four per month in 2006 to one per month in 2010.

Indeed, according to the current Quebec Superior Court's chief justice, increasingly longer hours are being spent in the courtroom.[396]

The existing reports on civil justice reform in North America warn that "cost, delay and complexity"threaten the contemporary administration of justice.[397] The legal system has responded to these problems by adding judges and courtrooms, and increasing judicial resources.[398] It has also encouraged the judicial management of cases and the cheaper dispute resolution methods such as mediation, arbitration and settlement conferences.[399] Canada has sought to reform its civil procedure through a Canadian Bar Association report entitled *Systems of Civil Justice Task Force*.[400] This report discusses the state of the various provincial civil

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[396] Chief Justice François Rolland, "Address" (opening ceremony address, delivered at the Faculty of Law, Université de Montréal, September 1, 2009) [unpublished]. In his address, Chief Justice Rolland indicated that the number of hours spent in the courtroom for audiences has grown by 10% in the last few years. This, of course, may also be the result of an inadequate administration of civil cases or caseloads by the parties and/or the courts. In the end, it is difficult to discuss judicial statistics and trends in Canada because the data available for analysis is generally non-existent, scarce or outdated.

[397] See, notably, the Québec Ministère de la Justice Report entitled "Une nouvelle culture judiciaire" (July 2001), online : http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crpc-rap2-intr.pdf.

[398] *Ibid*.

[399] Stephen B. Burbank & Linda J. Silberman, "Civil Procedure Reform in Comparative Context: The United States of America" (1997) 45:4 Amer. J. Comp. L. 675 at 678f.

[400] See Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Toronto: Canadian Bar Association, 1996). This Report was the first national survey discussing case management in Canada. See, also Ontario Civil Justice Reform Project, "Summary of Findings and Recommendations," online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf (In Ontario, civil justice reform has notably focused on providing access to the courts and proportionality throughout the civil process, while finding ways to trigger "cultural change" in litigation among the judges and lawyers to recognize and to better respond to problems in the system.)

justice systems and develops "strategies and mechanisms to assist in the continued modernization [and improvement] of the system".[401]

Hence, the first paradox of modern North American civil justice is that with the tendency to have more complex civil cases, greater numbers of civil filings[402] and problematic judicial administrations due to heavy and complex caseloads, we have seen a noteworthy decline in trial rates. Claiming a decline in trial rates appears contradictory when considering that the increasing complexity of civil cases is in part evaluated by the number of days spent in court. The claim is supported by the fact that cases are longer in duration because the law is more complex, and trials appear to, by and large, have been replaced by out of court settlements.

This phenomenon, generally referred to as the "Vanishing Trial,"[403] raises fundamental questions about the essence of civil justice, its new culture, and the underlying changes it is undergoing. Principally, why are increasingly more complex and interesting cases willingly cut short of adjudication and settled out of court? It certainly is primarily because of

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[401] Interestingly, the report also develops the idea that "lawyers, by virtue of their special role and expertise in the civil justice system, have a responsibility and are well placed to make informed and constructive contributions to improving the civil justice system". See *ibid*.

[402] Statistics in the Canadian provinces' court systems are consistent with the "Vanishing Trial" Phenomenon. For instance, while the Vancouver law courts heard in 1996 over 800 civil trials, they heard a mere 393 civil trial six years later, in 2002. See: British Columbia Justice Review Task Force, "Green Paper: The Foundations of Civil Justice Reform," (21 September 2004) [unpublished] at 1; online: http://www.bcjusticereview.org/working_groups/civil_justice/green_paper_09_21_04.pdf.

[403] The expression 'vanishing trial' originates from Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 J. Empir. Leg. Stud. 459 ["Galanter, Vanishing Trial"]. In a later article focusing on Federal court litigation trends (especially in a class action, mass claims resolution facilities and mandatory ADR processes context), Galanter reiterates his conclusion of declining trial rates. See e.g. Marc Galanter, "A World without Trials?" (2006) J. Disp. Resol. 7 ["Galanter, World Without"].

the cost, complexity and delay in civil justice, and because parties wish to maintain a form of control of their cases, and use alternative dispute resolution mechanisms to do so. But it could also be because judges are today required to set aside their traditional role as adjudicators to include more managerial responsibilities, and coincidentally they take on a greater role encouraging settlements,[404] which will be the subject of the second noted paradox, addressed below.

Legal processes have generally evolved to become more informative, conciliatory and negotiative.[405] But how will this move away from adjudication ultimately impact the development of substantive law? And more importantly, for our purposes, what has this done to the role of the North American judge?

ii. A Second Paradox: Our Modern Judge is "Hands-on," Involved and Managerial, But Still Prefers to Settle

In the modern reality of civil justice lies a second paradox. Our judges are simultaneously *more* involved in the organization and structure of litigation, and *less* involved in its substance, clearly preferring to settle civil cases.

Today's judges administer caseloads that are overflowing with ever-complex and lengthy cases. This new litigation reality has required that the classical figure of the judge presiding over a trial be replaced by the figure of a managerial judge busy organizing the case.[406] Hence, the

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[404] Galanter, Vanishing Trial, *ibid* at 515-31.

[405] Galanter, "World Without," *supra* note 403 at 23-33.

[406] Chad M. Oldfather, "Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design" (2007) Hofstra L. Rev. 125 at 130 ["Oldfather, Judges as

modern, North American judge is an active manager of cases, who conducts court business with great judicial efficiency. This judge administers civil cases from filing through disposition, seeking to achieve just, rapid, and inexpensive resolution of litigation.

In fact, this critical change in the role of the judges was noted twenty-five years ago by Yale Professor Judith Resnik, who then explained that they had become "managerial judges," supervising case preparation and monitoring case progression until completion, and deeply involved in shaping the litigation and its outcomes.[407] She also explained that the judges were now asking parties to prepare litigation plans, holding pre-trial conferences and scheduling orders and setting dates for trials. These judges were meeting with parties out of court to encourage consensus on factual and legal issues and, ultimately, settlement.[408] According to Resnik, they had evolved into "mediators, negotiators, and planners – as well as adjudicators." [409]

Today, case management is widely recognized, as significant aspects of it are provided in the U.S. Federal Rules[410] and in the fourth and most recent

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Humans"]; Galanter, "Vanishing Trial," *supra* note 403. Also see Judith Resnik, "Managerial Judges" (1982) 96 Harv. L. Rev. 374 ["Resnik, Managerial Judges"].

[407] At trial, Resnik indicated that the traditional adversarial model would still predominate. See Resnik, "Managerial Judges", *supra* note 406 at 377-78, 386, 403, where she describes managerial judging as a "pre and post-trial phenomenon".

[408] *Ibid* at 377-79.

[409] *Ibid*. Resnik explains at page 378 that "Judges have described their new tasks as 'case management' – hence my term 'managerial judges.'" On this "managerial judging" approach, also see Robert F. Peckham, "The Federal Judge as a Case Manager: The New Role in Guiding a Case from Trial to Disposition" (1981) 69 Cal. L. Rev. 779; Hon. Hubert L. Will, "The Role of the Judge in the Settlement Process"(1976) 75 F.R.D. 203.

[410] See e.g. U.S. F.R.C.P. 16(b).

Manual for Complex Litigation.[411] In Canada, the Federal Court and most Canadian jurisdictions similarly adopted new legislation aimed at judicially managing cases, where ongoing supervision or intervention is required. The *Federal Court Rules*, notably, provide that all cases before the Federal Court of Canada are subject to court management.[412]

In the province of Quebec, a mixed jurisdiction with civil codes,[413] the 2002 civil procedure law reform similarly gave courts greater general case management powers[414] and specific case management powers.[415] Class actions, for instance, are specially managed in Quebec from beginning to end, with one single judge assigned to oversee the case.[416] Interestingly, the Quebec Superior Court instigated, in January 2009, a case management pilot project in the judicial District of Longueuil, seeking to accelerate the

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[411] *Manual, supra* note 12 at 243 (In the class action context, "[b]ecause the stakes and scope of […] can be great, class actions often require closer judicial oversight and more active judicial management than other types of litigation.").

[412] Rules 380-99 F.C.R. The Rules provide three different case management tools: (1) status reviews, which are hearings held when the parties do not reach certain steps within the given time limits (rules 380-82); (2) specially managed proceedings, which are cases taken out of the usual court flow to proceed according to the case managing judge's orders (rules 383-85); and (3) dispute resolution, which takes the form of conferences, mediation, neutral evaluations or mini trials (rules 386-91). The province of Ontario also has a proposed Rule 77 R.C.P. which establishes civil case management, seeking to reduce unnecessary litigation delay and costs, promote early and fair settlements, as well as just determinations. This Rule structures litigation around time frames for specific events and stages of litigation, and preserves the flexibility needed to allow the parties to either settle, narrow or consolidate the issues of their case. See e.g. online: http://www.ontariocourts.on.ca/coa/en/archives/civilrules/Rule77.pdf.

[413] *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.,* [2001] 2 S.C.R. 743 at paras. 1, 12, 32, 39 ["*Lac d'Amiante*"].

[414] Indeed, article 4.1 Qc. C.C.P. provides that the Court "sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case." Case management powers are described in article 151.6 C.P.C. (at trial) and 508.1 C.C.P. (on appeal).

[415] Special case management is made possible by arts. 151.11ff. C.C.P.

[416] See arts. 1003ff. C.C.P.

conduct of all civil proceedings.[417] As of August 2009, the result of this project and of the introduction of a case manager has been tremendously positive, with appearances filed more quickly and civil justice being made generally more accessible.[418]

In the class action context, more specifically, coordination and management are crucial, given the existence of numerous complex class action claims, and the generally high stakes of the cases. These two functions also serve to "[achieve justice] for both parties as quickly and inexpensively as possible", considering "the existence of unidentified parties whose interests need to be protected; the need for administrative arrangements [...] for the giving of notice and the distribution of monetary relief; the need for procedures for the determination of sub-group issues and individual questions."[419] That is principally why most law reform commissions have recommended that class action judges assume an active role in class action case management in order to have them proceed expeditiously and efficiently.[420]

Federal Rule 23 similarly provides examples of judicial powers given to coordinate party activity. In Subparagraph 23(d), for instance, the judge

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[417] Pierre Noreau, Observatoire du droit à la justice, « Rapport de recherche: *Les conférences de conciliation et de gestion judiciaire* », June 3, 2010, unpublished.

[418] *Ibid*.

[419] Australian Law Reform Commission Report, Grouped Proceedings in the Federal Court (Report #46, 1988), online: http://www.austlii.edu.au/au/other/alrc/publications/reports/46/chap7.pdf at 70, cited in Mulheron, *supra* note 38 at 6.

[420] See e.g. Quebec's article 1045 C.C.P., which provides that the court may "at any stage of the proceedings in a class action, prescribe measures designed to hasten their progress and to simplify the proof, if they do not prejudice a party or the members; it may also order the publication of a notice to the members when it considers it necessary for the preservation of their rights."

has broad authority to "make appropriate orders: (1) determining the course of the proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, [and to] (5) [deal] with similar procedural matters."[421] Subparagraph 23(e), in addition to providing criteria and procedures for settlement approval, includes wide discretion concerning the ways to give notices of proposed settlements, second opt-out rights for (b)(3) class action settlements, and approvals to withdraw objections to proposed settlements.[422] Thus, Rule 23 does specifically give class action judges management powers.

One issue that immediately comes to mind – but opens up an entirely new debate – is whether judicial management really is effective in the class action context. Does it truly reduce case duration and caseloads? Does it ensure proportionality in class action procedure? And even if it presumably enhances the productivity of the process, does it ultimately lead to fairer and more equitable results? More specific to this thesis are the following questions: how effective is case management in the class action settlement context? How can judges in fact conciliate their roles of case manager and settlement judge, not to mention their more implicit and highly debatable role as settlement facilitators?

While the answer to these questions remains unclear,[423] lawyers who have cases that are managed by a judge are naturally encouraged to be better

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[421] F.R.C.P. 23(d).

[422] See e.g. F.R.C.P. 23(e)(1)(B), 23(e)(3) and 23(e)(4)(B) respectively.

[423] Judith Resnik has noted on this point, the lack of reliable data to support a firm conclusion that case management "decreases delay, produces more dispositions, and reduces litigation costs". See: Judith Resnik, "Managerial Judges and Court Delay: Unproven Assumptions", (1984) 23 Judg. J. 10 at 10. See also: Thomas D. Rowe, Jr., "Authorized Managerialism Under the Federal Rules – and the Extent of Convergence with Civil-Law Judging" (2007-08) 36 Sw. U. L. Rev. 191 at 193 ("the limited empirical

organized, and to work faster and more efficiently, while they are under steady judicial scrutiny.[424] This pressure is advantageous to litigants, who will be paying for a higher quality end product, and to society at large, who may benefit from fairer and more just results. There is also a risk, nonetheless, that lawyers involved in these case-managed cases will rely on the judge for direction, or bow to judicial pressure, voluntarily or not.

Another advantage of case management is that managing judges are forced to quickly and efficiently understand the case, from the onset of litigation, and to evaluate what will be the best course to follow for the remainder of the litigation, based on often limited information. Judging early and rapidly in the litigation may, however, lead judges to embrace their first impression of a yet underdeveloped case.[425] The judges may also spend more time evaluating the structure of the litigation, as opposed to its substance and the evidence, which is to the ultimate detriment of the litigants.[426]

Case management may also bring potential arbitrariness or bias into judicial decision-making. In a class action setting for instance, case managers both encourage the parties to settle and then give the final seal of approval to out-of-court resolutions of cases. Moreover, the more *ad hoc* adjudication by case managers is sometimes considered unfair to the

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evidence on managerial judging's effectiveness at reducing delay and cost, to which Professor Resnik referred, remains – despite major later efforts – fairly inconclusive.")

[424] See Richard L. Marcus, "An American Reaction to the Woolf Report," in A.A.S. Zuckerman & Ross Cranston, eds, *Reform of Civil Procedure* (Oxford: Clarendon Press, 1995) at 234 ["Marcus, American Reaction"].

[425] Donald Elliott, "Managerial Judging and the Evolution of Procedure" (1986) U. Chi. L. Rev. 306 at 328.

[426] See Resnik, "Managerial Judges", *supra* note 406, in which Resnik argues that case management inherently creates a variety of serious risks of compromising impartiality and thereby conflicts with the proper judicial role.

parties, "[b]ecause the rules of the managerial judging 'game' are not announced in advance and because litigants rarely receive reasoned explanations for managerial (as opposed to legal) rulings, managerial decisions may be perceived as unfair."[427]

Arguably, the importance of the judge's role can become diluted by having many actors collaborating within the litigation:

> […]One of the characteristics of [the] phenomenon [of case management] is that judges take a very different orientation to their work than did their predecessors, potentially viewing it as a product of their chambers – "the work of many hands"– rather than as their own, personal product. This, in turn, results in a reduction in the judge's sense of responsibility for that product, and in a consequent reduction in its overall quality.[428]

In the end, the true value of case management mostly depends on the type of case that is being litigated. For instance, complex mass tort class actions are the ideal cases to be case managed because of their complex legal issues, hundreds or thousands of class members, numerous lawyers, and

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[427] Elliott, *supra* note 425 at 328.

[428] Oldfather, "Judges as Humans", *supra* note 406 at 130-31.

heavy paperwork. On the contrary, routine litigation cases with "no dysfunction to cure" do not need to be case managed.[429]

Ultimately, for these reasons, and for many other reasons outlined later in the thesis – principally the inadequacy of the currently stated judicial role to the class action context - the "institutional architecture of the judiciary"[430] must be revisited to be better suited to the class action settlement context.

Frequently, case managing judges unfortunately become involved so deeply and early with the core issues of the class action litigation, and with the parties and lawyers, that they feel that the most efficient and efficacious option for the parties is to settle. They will then broach the possibility of settlement early in the litigation. Hence the second paradox of modern civil justice: how can judges become so heavily involved with the structure and organisation of a case – in addition to its legal and factual bases – as case managers, when in the end, they choose to prefer settlement over trial? While this reasoning may not appear entirely logical, there are many reasons for choosing to encourage settlement, the least of which is the "clearing dockets function." But would it not be more efficient and just to use the resources in time and effort already invested in the litigation to push the case through to trial?

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[429] Jay Tidmarsh, "Unattainable Justice: The Form of Complex Litigation and the Limits of Power" (1991-92) 60 Geo. Wash. L. Rev. 1683 at 1807.

[430] Oldfather, "Judges as Humans", *supra* note 406; also citing Owen M. Fiss, "The Bureaucratization of the Judiciary" (1983) 92 Yale L.J. 1442.

Settlement promotion is "one of the most" important consequences of case management.[431] It is a value that is deeply entrenched in North American judicial culture, albeit more so in the United States than Canada.[432] Where there appears to be a reasonable prospect of settlement, judges offer to mediate or to assign the case to another judge for a settlement conference. This heightened emphasis on settlement promotion has lead to a gradual "fading away of the preparation for trial rhetoric."[433] In fact, settlements have been said to produce results which are closest to the ideal of justice. A federal judge describing the process at a seminar for newly-appointed judges in 1975 indicated that "[o]ptimal justice is usually found somewhere between the polar positions of the litigants. Trial is likely to produce a polar solution, and often the jury or the judge has no choice except all or nothing. Settlement is usually the avenue that allows the more just result."[434] This statement, arguably, confirms that there is an impact of case management upon the settlement approval process.

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[431] R.F. Peckham, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution" (1985) 37 Rutgers L. Rev. 253. Also see: Institute for Civil Justice and published as *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act,* by J. S. Kakalik, et al., 1996, 51 pp., online: MR-800-ICJ.

[432] Canada's judicial culture appears to be more focused on cooperation rather than confrontation or competition. See e.g. Hugh F. Landerkin & Andrew J. Pirie, "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82 Can. Bar Rev. 249 at 265-66, citing Allen Linden, "In Praise of Settlement: Towards Cooperation, Away from Confrontation" (1984) 7 Can. Comm. L. J. 4.

[433] Marc Galanter, "The Emergence of the Judge as a Mediator in Civil Cases" (1986) 69 Judicature 257 at 261 ["Galanter, Emergence"]. In this article, Galanter describes the "history of judicial interventions in the development of settlement processes in the courts", and notes that "while most cases are settled out of court, in many instances the negotiations are encouraged, brokered or actively mediated by the judge" and that "this has become a respectable, even esteemed, feature of judicial work." See *ibid*.

[434] Marcus, "American Reaction", *supra* note 424 at 226-27 (quoting Tone, "The Role of the Judge in the Settlement Process" in *Seminars for Newly Appointed United States District Judge*s, 1975, 57 at 60.)

If we are to assume that settlements produce good and just results, and that they must be preferred over litigation, then we must also appreciate that "the judge actively [participate] in bringing them about."[435] Settlements, however, are not always good or ideal. For instance, and as discussed herein, the negotiation process may be unfair to one of more of the parties. This possibility is made even more dramatic in the class action context, where hundreds or thousands of individual class members are represented by one person. In that context, settlement negotiations are often conducted with many parties not having been made aware of certain facts, allegations or of the existence of the class action itself. They are also occasionally driven by lawyers with improper or fraudulent motives. In addition, settlements are often monitored and approved by judges whose prime objective is case management, and who view a trial as evidence of a failure of case management.[436] Resulting settlements may or may not end up being inherently fair to the parties either in monetary terms, or in view of the theoretical ideals of justice and fairness.

In sum, the direction of modern litigation is not linear. On the one hand, modern litigation is increasingly being managed by the courts such as to give them more control over the case. On the other, modern litigation is most frequently settled, giving parties exclusive control over the litigation. The North American judicial system, traditionally characterized by party control of disputes – subject only to a loose control by the courts, is changing dramatically in most jurisdictions, as judicial activism measures and new rules regarding case management and pre-trial conferences are

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[435] Galanter, "Emergence", *supra* note 433 at 261.

[436] See Edward Brunet, "Questioning the Quality of Alternative Dispute Resolution" (1987) 62 Tulane L. Rev. 1 at 50 (where author refers to "an attitude that a trial represents judicial failure").

enacted. In fact, the traditional models of adjudication are blurring and being replaced by a more cooperative judicial model.

iii. A Third Paradox: The Inquisitorial and Adversary Models are Increasingly Blurred and Being Replaced by Cooperative Justice

In the most recent decade, important changes have affected the fundamental character and characteristics of civil procedure. The traditionally employed inquisitorial and adversary models have tended to lose their importance and become blurred. In addition, the trend toward case management has implicated judicial functions similar to those used by inquisitorial judges, in a way to further confuse the traditional models. Hence the third paradox: the two traditionally efficaciously-working models appear to have been replaced by a model that promotes cooperation and the search for solutions, rather than adverseness.

While varied meanings have been assigned to the adversary and inquisitorial models, the wide – and perhaps overstated – assumption has been to associate the inquisitorial model to civil law systems, and the adversary model to common law systems. In the adversary system, the parties investigate the facts, define the legal issues, present the evidence and essentially argue the case. This system is founded upon party-autonomy and party-prosecution.[437] "Party-autonomy" signifies that the parties "define the subject-matter of their dispute, that is the substance of their action, and that they can pursue their legal rights and remedies as

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[437] Neil Brooks, "The Judge and the Adversary System", in Allen Linden ed., *The Canadian Judiciary*, (Toronto: Osgoode Hall, 1976) 90 at 93.

they so wish".[438] "Party-prosecution" signifies that the parties have the "primary responsibility" to choose how they will shape and structure the litigation, and which evidence they will present to the judge for adjudication.[439] They investigate, prepare, present and argue the evidence and the legal arguments, while the courts preserve their right to screen or prevent the initiation of cases that are abusive or moot. Once the case is initiated, the parties prosecute it as they wish, and the judge passively evaluates the merits of the case presented. He is not free to re-evaluate or adjust the terms or substance of the dispute.

By contrast, in the inquisitorial tradition, the judge investigates, gathers and reviews the facts and evidence, while the lawyers keep an eye over what is being done.[440] He has the "unqualified obligation to ascertain the truth,"[441] "within the limits set by the pretensions of the parties, [but] without being dependent on the conduct of the parties."[442] He will rely

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[438] *Ibid*. Also see Maximo Langer, "The Rise of Managerial Judging in International Criminal Law" (2005) 53 Am. J. Comp. L. 878 at 887; J.A. Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52 Int'l & Comp. L.Q. 281 at 289 ["Jolowicz, Adversarial"].

[439] *Ibid*. Also see Marvin Frankel, "The Search for Truth: An Umpireal View" (1975) 123 U. Pa. L. Rev. 1031 at 1042 ("The ignorant and unprepared judge is, ideally, the properly bland figurehead in the adversary scheme of things. Because the parties and counsel control the gathering and presentation of evidence, we have no fixed, routine, expected place for the judge's contributions.")

[440] John H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U.Chi. L. Rev. 823 at 826-7.

[441] Franklin Strier, "What Can the American Adversary System Learn from an Inquisitorial System of Justice?" (1992) 76 Judicature 109 at 162.

[442] Jolowicz, "Adversarial", *supra* note 438 at 43 n. 106

heavily on experts that he will have selected himself, and will personally conduct the examinations and cross-examinations of witnesses.[443]

Mirjan Damaška, in *The Faces of Justice and State Authority*, interestingly prefers not to use the term "inquisitorial" and instead, refers to "adversarial" and "nonadversarial" modes of proceeding.[444] He explains:

> The adversarial mode of proceeding takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The nonadversarial mode is structured as an official inquiry. Under the first system, the two adversaries take charge of most procedural action; under the second, officials perform most activities.[445]

By requiring the affected parties to engage actively in the adjudication of their disputes, the adversarial process empowers individuals to participate, control and shape the litigation, and ensures that the

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[443] Langbein, *supra* note 570 at 828-29, 835-41. Also see Hein Kotz, "The Role of the Judge in the Court-Room: The Common Law and Civil Law Compared" (1987) J. South Afr. L. 35 at 37.

[444] Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) at 3. In his treatise, Damaška in part argues in favour of alternative models of judicial organisation: the coordinate and hierarchical models. In the coordinate model, "lay decision-makers in a horizontal relationship of power among themselves exercise authority. In the hierarchical model, legal professional decision-makers whose relationships are hierarchically ordered exercise authority."

[445] *Ibid* at 16f.

resolution of disputes is reached by a neutral, impartial and uncommitted arbiter. This process relies on the accurate and fair presentation by the parties and their lawyers of all the relevant information, and on the search for truth and justice.

Within North America, civil justice is characterized by the adversarial model. In the United States, civil procedure officially became an adversary system with the enactment of the *Federal Rules of Civil Procedure*.[446] In fact, the American judge has traditionally been portrayed as the neutral and stoic figure "who remains above the fray and whose primary mode of action is detached reaction".[447] His role is superbly illustrated by Duncan Kennedy, who explains that American judges are asked to "'rise above' and 'put aside,' to 'resist' and 'transcend,' their personal interest, their instinctive or intuitive sympathies, their partisan group affiliations, and their ideological commitments. They are asked to 'submit' to something 'bigger' and 'higher' than 'themselves.'"[448] This role has been affected by the advent of case management, discussed above, which has forced judges to become more active and involved in the litigation at its very onset.

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[446] Resnik, "Managerial Judges," *supra* note 406 at 380-82. As a preliminary note, the adjudicative process must be distinguished from the adversarial system. Adjudication is a method of settling disputes that is commonly contrasted with other methods of dispute resolution such as negotiation, conciliation, mediation. It refers to a means of resolving disputes in which some general principle or rule of law is applied to the facts that give rise to the dispute and in which the parties involved are able to participate by presenting evidence and reasoned argument. See: Brooks, *supra* note 437 at 91. Also see Amalia D. Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial" (2005) 90 Cornell L. Rev. 1181.

[447] For a depiction of this conception of the judicial role, see e.g. Fuller, "Forms", *supra* note 4.

[448] Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997) at 3.

In Canada's mixed legal system,[449] the adversarial model continues to dominate much of civil litigation. Adjudication in the common law provinces is viewed as requiring active parties to each seek to best present their case to passive and aloof judges. [450] Interestingly, in the province of Quebec, where civil matters are regulated by the civil law tradition, civil procedure has historically been strongly influenced by the common law and its mainly adversarial model.[451] Accordingly, the system of

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[449] Of course, what we mean by mixed here is the fact that all Canadian provinces and territories, except Quebec, follow the common law legal tradition. Quebec's legal system is a hybrid one as private law generally follows the civil law tradition, and public law generally follows the common law tradition.

[450] *Phillips v. Ford Motor Co. of Canada Ltd.*, [1971] 2 OR 637 (CA), where the Canadian civil justice system was described as follows: "Our mode of trial procedure is based upon the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. […] a court must be concerned with truth, […] but it cannot embark upon a quest for the "scientific" or "technological" truth when such an adventure does violence with the primary function of the court, which has always been to do justice, according to law."

[451] Indeed, before the first codification of Quebec civil procedure, the rules of practice established by the courts incorporated many elements of common law procedure. Moreover, the first Civil Code of Civil Procedure thereafter enacted in the province on June 28, 1867 preserved this common law influence as it compiled all existing law and rules on procedure, without rationalization or reconciliation of the different and differing origins of the rules. See e.g. Daniel Jutras, "Culture et droit processuel : le cas du Québec" (2009) 54 McGill L. J. 273; J.-M. Brisson, *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867* (Montréal : Éd. Thémis, 1986) at 60-61, 155-61. Also see Supreme Court of Canada cases in *Globe and Mail v. Canada (A.G.)*, 2010 SCC 41 at para. 28 and *Lac d'Amiante, supra* note 413 at paras. 28f. ("Although Quebec civil procedure is mixed, it is nonetheless codified, written law, governed by a tradition of civil law interpretation." And later at para. 33 "civil trials in Quebec are conducted within a framework that has been influenced by the common law courts. Characteristics such as the adversarial nature of the proceeding, the roles assigned to lawyers and judges, the direct examination of witnesses before the court and, now, the use of examinations on discovery, all demonstrate how significant this contribution to the civil procedure of Quebec has been.") See also Noël Jean Mazen, "Le juge civil québécois (Approche comparative d'un système de droit mixte) " (1982) 34 :2 Revue intern. de Dr. Comp. 375

presentation of a judicial case and the role of the civil judge are, similarly, adversarial.

Certain authors have reasoned that only an adversarial presentation will assure that judges adjudicate "correctly."[452] But in response, one wonders whether the adversary system is, in fact, properly suited to today's civil justice system, where most cases settle and are rarely pleaded to the adjudicator.[453]

In truth, the many changes affecting civil procedure around the world have made the distinction between adversarial and inquisitorial models less relevant.[454] Two noteworthy developments are the increased cooperation amongst judicial institutions and the slow convergence of certain principles of civil procedure.

The first development, judicial cooperation, is noticeable in projects such as the European Union Commission's Communication Project entitled "Towards a European E-Justice Strategy," which seeks to create a European e-justice portal that provides access to information and direct

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at 403 ("le droit québécois ne respecte ni les règles d'un véritable système de common law ni celles d'un système purement civiliste. Il constitue un droit mixte qui, sans appliquer pleinement le principe du précédent, n'en manifeste pas moins un respect étonnant et parfois excessif des décisions rendues […]"); Jean-Claude Royer, *La preuve civile* (Cowansville : Ed. Y. Blais 2008) at para. 49. Finally, c.f. Yves-Marie Morissette, « Gestion d'instance, proportionnalité et preuve civile : état provisoire des questions » (2009) 50 :2 Les Cahiers de Droit 381.

[452] Jolowicz, "Adversarial", *supra* note 438 at 288f.

[453] Certain authors have argued that the adversarial system "increases the accuracy of fact-finding [because] (1) the parties are motivated by self-interest and hence likely to be more diligent in presenting and critically evaluating the evidence, [and (2) the adversarial model] counteracts bias in decision-making". See Brooks, *supra* note 437 at 104f.

[454] J.A. Jolowicz, "Civil Procedure in the Common and Civil Law" in Guenther Doeker-Mach & Klaus Ziegart eds, *Law and Legal Culture in Comparative Perspective* (Stuttgart: Franz Steiner Verlag, 2004) 26 at 30 ["Jolowicz, Civil Procedure"].

access to certain European procedures.[455] In North America, judicial cooperation mostly exists in the enforcement of foreign judgments, even in the absence of international treaties to that effect.[456] Cooperation is also noticeable in civil processes as they increasingly require and promote the cooperation of all actors within the litigation to reach equitable and efficient outcomes. In fact, a direct application of the cooperation model is Article 10.2 of the UNIDROIT Principles, which provides that the court's judicial management, "to the extent reasonably possible, […] be in consultation with the parties."[457]

The second development is the slow convergence of the traditional adversary model with the Continental European model – less adversarial and dominated by the actions of lawyers, and more focused on "judicial fact-gathering."[458] This convergence has resulted in common sets of procedures and similarities between the judicial systems on matters

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[455] Commission of the European Communities, "Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Towards a European e-Justice Strategy", Brussels 30.5.2008, COM (2008)329final, online: http://ec.europa.eu/civiljustice/docs/com_2008_329_en.pdf.

[456] Carlos A. Gabuardi, « Institutional Framework for International Judicial Cooperation: Opportunities and Challenges for North America", published virtually in the Biblioteca Juridica Virtual del Instituto de Investigaciones Juridicas de la UNAM, online: http://info8.juridicas.unam.mx/pdf/mlawrns/cont/2/cmm/cmm7.pdf, at 175.

[457] Article 10.2 of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure, Council Draft No.1 (Nov. 16, 2001), online: http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf ["UNIDROIT Principles"]. Also see Article 15.4 ("An additional party has the same rights and obligations of participation and *cooperation* as the original parties."[italics added]). Also see e.g. Lord Woolf's *Access to Justice* Report (July 1996), online: http://www.dca.gov.uk/civil/final/overview.htm. The Reform provides, in part, that "litigation will be less adversarial and more co operative (…)".

[458] Langbein, *supra* note 440; Wayne Brazil, "The Adversary Character of Civil Discovery: A Critique and Proposals for Change" (1978) 31 Vand. L. Rev. 1295 at 1298-1303. See also Jolowicz, "Civil Procedure", *supra* note 454 at 48 (suggesting that there may eventually be a convergence of the systems, but not of procedural techniques).

related to "the assertion of jurisdiction and subject-matter jurisdiction, specifications for a neutral adjudicator, procedure for notice to defendants, rules for formulation of claims, explication of applicable substantive law, establishing facts through proof, provision for expert testimony […]".[459]

The generalized promotion by judicial systems of ideals such as procedural efficiency may have caused this phenomenon of accelerated convergence of the adversarial and inquisitorial models. The trend toward managerial judging may be another cause, especially because certain functions of the managerial judge arguably mimic those of the inquisitorial model.[460] It is true that in both models, the judge is active and controls the shape and structure of the litigation. But one can argue that the case managing judge does not primarily seek to find the truth; instead, he primarily seeks to find ways to "expedite process" [461]:

> The managerial judging system conceives procedure as a device that the court, with the parties' assistance, wields to expedite process. Unlike the passive and uninformed court of the adversarial system, the managerial court gets

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[459] Commentary to UNIDROIT Principles, online: http://www.ali.org/ali_old/ALIUNIDROITtrans.htm#commentary.

[460] Rowe, *supra* note 423 at 203; citing, notably, Linda S. Mullenix, "Lessons from Abroad: Complexity and Convergence" (2001) 46 Vill. L. Rev. 1 at 13-14 ("Although our judges still are not fact-finders, it is difficult not to take note of the increasing managerial involvement of judges in the resolution of complex cases, often verging on functions such as fact-finding.") See also Howard M. Erichson, "Mass Tort Litigation and Inquisitorial Justice" (1998-99) 87 Geo. L. J. 1983 at 2010-11; Langbein, *supra* note 440 at 858-62, 865-66 (arguing that managerial judging is irreconcilable with adversary theory, and viewing trend toward managerial judging as a sign of convergence with inquisitorial systems).

[461] Langer, *supra* note 438 at 836.

> information about the case very early in the process in order to actively pressure the parties to reach factual and legal agreements and accelerate their pre-trial investigations and trial cases. But unlike the court of the inquisitorial system that actively investigates the truth, the managerial court is active to make sure that the parties do not delay proceedings.[462]

Furthermore, the relationship between the different actors within the litigation is conceived differently in the two traditional models of civil adjudication and in case management:

> If the adversarial system conceives the relationship between the main procedural actors as a dispute between two parties before a passive umpire, while the inquisitorial system presumes an official investigation that impartial officials conduct to find the truth, the managerial judging system conceives procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible.[463]

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[462] Langer, *supra* note 438 at 836.

[463] *Ibid* at 878.

Accordingly, while there exists a certain convergence of procedure, its extent may not yet be significant. The models can be interfered with, and the roles of the actors can be reformed in ways that challenge the true definitions and boundaries of the adversary or inquisitorial models. For instance, judges are gradually becoming more active, in part to "rein over and control" lawyers who are being afforded more powers throughout the litigation.[464] And in the class action context, we are seeing an implicit *volte-face* of the traditional roles of the court (passive) and of the parties (active), as the judge is inclined to become active and involved in a more inquisitorial manner, attempting to safeguard the rights of passive class members.[465]

Beyond the models' suggested convergence, arising from the external influences and pressures to have efficient judicial systems and to case manage litigation, the models themselves could eventually disappear because their definition and content are in constant "flux":

> In the twelfth century the dichotomy was already in use to distinguish a process that required the impetus of a private complainant to get under way (*processus per accusationem*) from a process that could be launched in his absence (*processus per inquisitionem*). […] each label now denotes distinctive clusters of traits in shifting combinations, not infrequently conflicting

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[464] Richard Marcus, "Reining in the American Lawyer: The New Role of American Judges" (2003) 27 Hast. Int'l & Comp. L. Rev. 3.

[465] Richard A. Nagareda, "Administering Adequacy in Class Representation" (2003) 82 Tex. L. Rev. 287 ["Nagareda, Administering"].

> with one another. Only the core meaning of the opposition remains reasonably certain. […] Beyond this core meaning uncertainty begins. It is unclear how far the adversarial process yields to the wishes of the parties ("how passive is the judge?") and how pervasive official control is in the inquisitorial mode ("how active the officials?). […] Another dimension is added to the complexity by the inclination of both Anglo-American and Continental lawyers to develop native variations on the theme of adversarial and inquisitorial proceedings.[466]

Accordingly, we are left with two models that have traditionally worked well, but are, with the modernization of civil justice, in danger of collapsing. These models are slowly being replaced by a new model that is not only cooperative, but plural.[467] In addition, this model is one in which civil processes are multi-faceted, alternative dispute resolution systems widely accepted, and settlements prioritized in a way to largely replace the traditional trial on the merits. Indeed, only a minority of problems are today resolved by resort to adjudication. Civil justice actors prefer to find solutions to problems and to develop ways to prevent these problems.[468]

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[466] Damaška, *supra* note 444 at 3-4.

[467] Claude Nélisse, "Le règlement déjudiciarisé : entre la flexibilité technique et la pluralité juridique" (1992) 23 R.D.U.S. 269.

[468] Marie Deschamps, "L'accès à la justice: l'affaire de chacun" (2009) 50:1 Cahiers de droit 247 at 253.

Ultimately, perhaps the traditional models will only stay useful as cultural models, legal identities,[469] or as reference points to understand the role of the judge in our modern society. What remains certain is that they are useful to developing adequate solutions for reform.

iv. A Fourth Paradox: Traditionally Adversarial Judges are Being Forced to Adjudicate in a Non-Adversarial Class Action Settlement Context; or Why the Adversary Model Is Not Appropriate for the Class Action Settlement Review

The role of the judge inquiring into the fairness of class action settlements is complex and conflicted. Parties to the proposed settlement have essentially "contracted to settle"[470] and are no longer adversaries. Since this settlement is mostly the work of lawyers, as opposed to class members[471], adequacy of representation must be carefully monitored by the judge. A fairness hearing is held, at which stage the parties' arguments and formal proposal to settle are presented. However, since all the parties want to see the settlement approved, they rarely challenge the settlement or adequacy or inadequacy of representation by counsel, or discuss any

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[469] See e.g. H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000) at 33-40; Kennedy, *supra* note 448.

[470] See Nagareda, "Mass Torts", *supra* note 69.

[471] Jack B. Weinstein & Karin S. Schwartz, "Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements" (1995) 163 F.R.D. 369 at 382-83 (fairness hearings "are often carefully orchestrated by the parties, who are no longer adversarial but are now joined in support of a proposed settlement, to display the best aspects of their agreement"). Also see Resnik, "Litigating and Settling", *supra* note 36 at 854 ("Settlement in group litigation is all the more problematic. We know that it is the lawyers who offer consent on behalf of those they represent. We know that, in many kinds of cases, lawyers are the largest stakeholders – with more riding on costs and fees than any individual plaintiff [...] will recoup. Further, we know that it is meaningless to speak of the discipline of clients monitoring attorneys when the "clients" number in the thousands.").

potential deficiencies in the settlement. As Professor Geoffrey P. Miller explains:

> Judges face significant obstacles in carrying out the task of evaluating proposed settlements. Because the matter has been settled, plaintiffs' counsel is now aligned with the defendant. These parties often make good faith efforts to present an accurate analysis, but their common interest in promoting the settlement undermines the safeguard of adversarial testing. […]
>
> Lacking fully effective assistance from others, the judge has no alternative but to investigate the settlement herself. The task is difficult. The judge is largely at the mercy of evidence introduced by the parties. Although the judge can observe the terms of the settlement, these are often difficult to quantify.[472]

This creates an inherent conflict of interest and a true adversarial void at the hearing, aptly described by Mr. Justice Paul Perell in a recent Ontario class action settlement approval case:

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[472] Geoffrey P. Miller, "Competing Bids in Class Action Settlements" (2003) 31 Hofstra L. Rev. 633 at 635 ["Miller, Competing Bids"].

> Normally, courts make determinations in the context of the dynamics of the adversary system where opposing views are heard. The theory of the adversary system is that truth and justice will emerge from the crucible of the opposing arguments and presentations of competing cases. However, for settlement and fee approvals because of the obvious conflict of interest of class counsel, the absent class members - who will be bound by the settlement - have no one to make their argument, unless a class member comes forward to raise an objection, which rarely occurs, or unless the court takes on the role of being an active advocate for the class, which the court is ill-equipped to do.[473]

Indeed, many authors have argued that the judge is "ill-equipped to engage in independent factual investigation of [the] issues" without an adversarial presentation of the issues.[474]

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[473] *Smith v. National Money Mart*, 2010 ONSC 1334 at para. 27. Mr. Justice Perell disagrees with those authors who say judges are "not up to the task ." Indeed, he explains at para. 32: "I do not agree that judges are not up to the task of determining whether to approve settlements and class counsel fees, but I do agree with all the commentators that the tasks are difficult and made more difficult by the adversarial void." For discussion of this precise topic, see Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and *Cy Près* Distributions" (2010) 6:1 Can. Class Action Rev. 217 at 253.

[474] Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanfordm CO.: Standford University Press, 2009) at 216. While Redish discusses the settlement class only in this extract, I believe that his reasoning similarly applies to settlements of certified class actions. Also see Kalajdzic, *ibid*, citing John

This leads me to the last paradox: the traditionally adversarial role of the judge is not appropriate to the modern class action settlement review and approval context. Indeed, judges often exert a passive role at the fairness hearing, leaving many arguments unchallenged and leading the way to presumptions about the fairness of proposed settlements and rubberstamped approvals.[475] Furthermore, they often conclude to the fairness, reasonableness and adequacy of settlements without further discussing their character. In fact, my careful review of Canadian and American federal judgments has revealed that judges rarely deny proposed settlements.[476]

The role of the judge approving class action settlements and fees has been qualified by Barbara J. Rothstein & Thomas E. Willging as a truly difficult and challenging task for the settlement judges:

> Reviewing proposed settlements and awarding fees are usually the most important and challenging assignments judges face in the class action area. Unlike settlements in other types of litigation, class action settlements are not an unmitigated blessing for judges. Rule changes, precedent, recent legislation, and elemental fairness to class members direct you not to rubber-stamp negotiated

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Kleefeld "Class Actions as Alternative Dispute Resolution" (2001) 39 Osgoode Hall L.J. 817.

[475] Alon Klement, "Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers" (2002) 21 Rev. Litig. 25 at 45-46.

[476] See *infra* text supporting footnotes 607ff. This proposal is also supported by the interviews of judges, as further expressed in Chapter IV *infra*. See Piché, *supra* note 380.

> settlements on the basis of a cursory review. Current rules […] unambiguously place you in the position of safeguarding the interests of absent class members by scrutinizing settlements approved by class counsel. Be aware that the adversarial clashes usually end with the settlement. […] Thus, you need to take independent steps to get the information that you'll undoubtedly need to review a settlement agreement.[477]

On the one hand, these judges are required to be "highly vigilant" in carefully examining settlement terms and conditions.[478] On the other, they are asked not to review settlements in such detail as would be required at a trial, as this would go against the purpose of settlement.[479] Hence, judges are simultaneously required to get comfortably involved in the review process as "ombudsmen" or "guardians" of the members' interests or "fiduciaries",[480] and remain impartial and neutral, favouring "neither the

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[477] *Pocket Guide*, *supra* note 168 at 8.

[478] *Weinberger v. Kendrick*, 698 F.2d 61, 1983 U.S. App. LEXIS 31033 (2d Cir. 1982) ["*Weinberger*"] at 74 (the court must "apprise[…] itself of all facts necessary for an intelligent and objective opinion"); Lambert, *supra* note 148 at 99, n. 62 (explaining that courts must "provide written reasons that include specific findings as to the 'fairness, reasonableness and adequacy' of the proposed settlement and explain how the court reached those findings").

[479] See *Re Compact Disc Minimum Advertised Price Anti-trust Litigation*, 216 F.R.D. 197 at 211 (Me. Dist. Ct. 2003) (settlement judges "should not prejudge the merits of the case [because they might be called upon to] decide the merits if the settlement fails").

[480] We will discuss all of these roles *infra*, in text accompanying footnotes 488ff.

proponents of the settlement nor those who are opposed or absent."[481] It is hard to fully reconcile these roles.

Moreover, judges have important and difficult issues to address at the fairness hearing, such as "how deeply to inquire into such questions as whether counsel really are adequate in the substantive as well as procedural or ethical sense; how much the conduct of lawyers should be scrutinized in assessing the fairness of the deal; and how much the court can, should, or must evaluate the substantive fairness of the negotiated deal."[482] While no one can properly assist the judges in answering these questions, the concept of settlement fairness remains profoundly inadequate, principally because it relies upon the use and reference to lists of settlement fairness factors. Reviewing judges want to properly evaluate the advantages and disadvantages of proposed settlements, but they are often left unaware of the settlement's disadvantages at a hearing, and basically lack information to decide. Indeed, the settling parties will agree in advance to the settlement's terms and substance, and present only its advantages.[483]

Accordingly, at the fairness hearing, judges should not act merely as neutral and passive adjudicators waiting for the parties and counsel to argue their case, in line with the adversary system. Instead, and as will be

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[481] *Figueroa*, *supra* note 98 at 1320.

[482] Menkel-Meadow, "Ethics", *supra* note 13 at 1184. The review process will be further discussed herein, and in Chapter III when reviewing the standard of settlement fairness.

[483] See e.g. *In re Gen. Motors*, *supra* note 98 at para. 57 ("Because the issue of certification is never actively contested, the judge never receives the benefit of the adversarial process that provides the information needed to review propriety of the class and the adequacy of settlement"). See also Weinstein & Schwartz, *supra* note 471 at 382-83 (fairness hearings "are often carefully orchestrated by the parties, who are no longer adversarial but are now joined in support of a proposed settlement, to display the best aspects of their agreement").

further discussed below[484], they should be active, forthcoming and engaged in "ascertaining ultimate verities."[485] Judicial review should be "exacting and thorough."[486] To overcome potential abuse, they should carefully scrutinize the proposed settlement, seeking to determine whether it is fair, reasonable and adequate to the class.

In fact, neither of the two traditional models of adjudication is perfectly suited to or adequate for the class action system. Because the class action concerns absent or unnamed class members who have not expressly consented to the lawsuit, it contradicts the traditional conceptions of the judge, lawyers and parties' roles within the litigation.[487] Class action judges become the protectors of class members and in doing so, they often become so actively involved in class action management that they assume some of the lawyers' traditional functions – such as organization of the procedures and strategy of the case – functions that they may – or may not – be completely comfortable with. As discussed in the previous subsection, class representatives and class counsel too have duties to protect the absent class members, duties that are difficult to fulfill because they do not know who most of the class members are, or what their interests may be.

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[484] See *infra* Subsection III.

[485] As opposed to being merely be engaged, in conformity with the adversarial tradition, in determining whether the "proper result [was] arrived at, having regard to the evidence before [him]". See Kotz, *supra* note 443 at 37 (citing *Hickman v. Peacey*, 1945 AC 304 at 318).

[486] *Manual*, *supra* note 12 at 309-311.

[487] H. Patrick Glenn, "Class Actions in Ontario and Quebec" (1984) 62 Can. B. Rev. 247 at 268; Redish, *supra* note 474.

b. The Current Role of Settlement Judges

The role of judges in civil litigation has greatly evolved in the last several decades, especially in light of the new managerial duties they must assume in ever-complex cases, specifically in the class action and mass torts arenas. The principal challenge for judges has been to ascertain how to react to continuing societal, cultural and legal changes, which each bring challenges to their current responsibilities and judging philosophy.

Judges assigned to class action supervision and adjudication are in a difficult position. Their task is onerous, in great part because they are required to protect the interests of many different actors within the class action litigation: the class representative, objectors from the class who are opposed to the terms of the settlement, and other class members – both present and absent. They must also – if rather indirectly – protect the interests of all persons potentially affected by the class action as they strive to achieve fair outcomes and promote respect for class action objectives.

Because class action litigation is traditionally more complex than other kinds of litigation, it requires greater administration and management of the case; tasks that North American judges are not traditionally responsible for and not necessarily comfortable with. Meanwhile, the principal characteristics of their role are not generally well defined in the law of our four chosen jurisdictions.

As I further elaborate in Chapter III, class action settlements must be judicially approved by the courts to be rendered effective. This principle is

recognized statutorily in Canada and in the United States.[488] Before approving a settlement, judges must examine whether the proposed settlement is fair, reasonable and in the best interests of "all those who will be affected by it".[489] Precisely, they are concerned with "safeguarding the interests of the absent class members through an analysis of the fairness and reasonableness of the settlement *as it relates to those interests*. [italics added]."[490] They must evaluate the proposed settlements and either approve or reject them, without modifications or formal amendments.[491]

Class action procedure is peculiar because it concerns class members who are generally unable to protect their own interests for lack of knowledge, motivation or financial resources.[492] When class actions are settled, there is no true "client" to the case, and all parties agree to the proposed deal. The courts then adopt the role of a "skeptical client," critically examining the settlement terms as well as the implementation and administration procedures.[493] But how must this skeptical client evaluate the abstract notion of fairness, and at which stage? Must it be at the settlement negotiation stage, at the fairness hearing stage or at the settlement implementation stage? How must the settlement judge properly reflect,

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[488] See *supra* text accompanying footnote 11. Also see generally Piché, *supra* note 380.

[489] In the United States, this standard is codified in Rule 23(e)(1)(C). Also see e.g. *Grunin*, *supra* note 115. In Canada, there is no equivalent statutory provision, such that courts have had to develop a similar standard for the judicial oversight of class action settlements. See e.g. *Dabbs No. 1, supra* note 11 at paras 10ff. Also see *supra*, text of footnote 115.

[490] *McCarthy*, *supra* note 197 at para. 16; *Endean*, *supra* note 117 at paras. 13, 14 and 18.

[491] See e.g. in the U.S., *Hanlon, supra* note 118 at 1026 ("The settlement must stand or fall in its entirety."); and in Canada, *Sawatzky*, *supra* note 118 at para. 20; *Dabbs No. 1*, *supra* note 11 at para. 10.

[492] *Manual*, *supra* note 12 at para. 21.61.

[493] *Ibid*. (The court must "make an independent analysis of the settlement terms").

react and adjudicate in the out-of-court, "in the shadow of the law"[494] context of settlement?

The United States Federal Judicial Center recently published a "Pocket Guide" for judges which describes the role judges carry as "skeptical clients" and the method they should use to evaluate class action settlement fairness:

> Current rules, particularly Rule 23, *unambiguously place you in the position of safeguarding the interests of absent class members by scrutinizing settlements approved by class counsel*. Be aware that adversarial clashes usually end with the settlement. […] Thus, you need to take *independent steps to get the information* you will undoubtedly need to review a settlement agreement. [italics added][495]

This excerpt illustrates the difficulty with the currently mandated role of the judge ascertaining the fairness of a class action settlement, a role that requires traditionally adversarial and neutral judges to become active in obtaining additional information about proposed settlements. Judges are invited in this guide to search "elsewhere", and to take "an independent and hard look at the merits of the claims and defenses."[496] But where is this information to be searched, obtained and/or found? And how

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[494] Expression taken from Ronald Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950 at 997.

[495] Pocket Guide, *supra* note 168 at 10.

[496] *Ibid* at 10-11.

profoundly and energetically can and must judges really search for such information? How can these judges know what information is missing? In essence, what limits does the judicial discretion have?

There are few real answers to these questions. Upon a careful review of the proposed settlement and of its implementation terms, judges are directed to identify all potential sources of information about the settlement, and to use these sources to obtain additional agreements concluded amongst counsel, comments from objectors, or additional settlement terms.[497] The information considered important to the settlement review is the information relevant to the settlement terms, the merits and reasons for the class members' claims, the anticipated benefits to the class, the number of claims filed by the members, and the proportion of the settlement likely to compensate the members.[498] It is found in agreements made in connection with the settlement, in prior individual settlements, in certification papers, or in evidence from the preliminary review hearing.[499]

The above-cited extract also refers to the duties of protection of absent class members by the class action judge. In fact, American courts have described the class action judge as a "fiduciary of the absent class members".[500] They have used trusts and estates law concepts and a language used in business relations to qualify the judge's duty at the

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[497] *Ibid* at 11.

[498] *Ibid* at 12.

[499] *Ibid* at 12-13.

[500] See e.g. Chris Brummer, "Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits" (2004) 104 Colum. L. Rev. 1042. For U.S. Caselaw, see notably: *Stewart v. General Motors Corp*., 756 F.2d 1285 (7th Cir. 1985); *Plummer v. Chemical Bank*, 668 F.2d 654 at 660 (2d Cir. 1982) ["*Plummer*"].

fairness hearing to protect the rights of absent class members, as a "high duty of care that the law requires of fiduciaries."[501]

Indeed, in *Reynolds v. Beneficial National Bank*[502], Seventh Circuit Judge Posner described the role of the trial judge involved in reviewing class action settlements as a "fiduciary for nonparticipating class members."[503] In that case, a class action had been brought by recipients of income tax refund anticipation loans, for failure to disclose the ownership of part of the loans by H&R Block. A settlement was reached, and subsequently approved by the district court. The defendants mailed notices to 17 million people, one million filed claims, and 6000 opted out.[504]

On appeal, Judge Posner held that the settlement judge's responsibility is to monitor the agency relationships within the class action. He added that since the "questionable antecedents" to the certification suggested collusion or prejudice to absent class members, district judges needed to "exercise the highest degree of vigilance" in examining the proposed class action settlement.[505] Several objectors filed an appeal from the decision.[506]

Judge Posner in effect reversed the district court's decision because he did not believe that the district court judge had reviewed "the settlement's

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[501] *Reynolds, supra* note 237.

[502] *Ibid* at 279-80.

[503] *Ibid* at 279-80. Also see *In re Communics. Sec. Litig*., 798 F.2d 35 at 37 (2d Cir. 1986) ["*Re Warner*"] ("a district court has the fiduciary responsibility of ensuring that the settlement is fair."); *Re Cendant Corp. Litig*., 264 F.3d 286 at 296 (3d Cir. 2001) ["*Re Cendant*"].

[504] *Ibid Reynolds* at 237.

[505] *Ibid* at 279, 288.

[506] *Ibid* at 279-82.

adequacy [with] the care that it deserved."[507] He explained that the settlement was approved "primarily because [the first judge] thought the prospects for the class if the litigation continued were uncertain".[508] Judge Posner concluded that he had abused his discretion, when he "painted with too broad a brush, substituting intuition for the evidence and careful analysis that a case of this magnitude, and a settlement proposal of such questionable antecedents and circumstances, required."[509] The trial judge should have been more rigorous. Judge Posner ordered that the case be remanded for further deliberations.[510]

In a comment about the *Reynolds* case, Professor Chris Brummer explains Judge Posner's statement about the fiduciary role of the judge as refering to both (1) an "affirmative obligation [to exercise] good faith effort, […] even in the absence of bad faith, positive action or conduct on the part of the trial judge to exercise alertness,"[511] and (2) an exercise of due care in balancing a list of case-specific factors, to determine whether the judge has adequately protected the absent class members.[512] In addition, he characterizes Judge Posner's statement of the judicial role as a "seemingly static duty of vigilance," tempered by increased judicial scrutiny when settlement negotiations raise red flags.[513]

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[507] *Ibid* at 280.

[508] *Ibid* at 284.

[509] *Ibid* at 283.

[510] *Ibid* at 289.

[511] Brummer, *supra* note 500 at 1065-66.

[512] *Ibid* at 1065-66.

[513] *Ibid* at 1066-67.

The American caselaw has correctly explained that the fairness determination depends entirely on the judge's discretion, and that this responsibility to determine fairness places him on the "firing line":

> Such a determination [of fairness] is committed to the sound discretion of the trial judge. Great weight is accorded to his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.[514]

Interestingly, the *ALI Principles of the Law of Aggregate Litigation*[515] advocate a shared responsibility of the judge, class counsel and the class representative, to ensure fairness, justified by the need for added protection to class members in the class action context.[516] Other than a subsection on approval of settlement classes[517] and one on *cy près* settlements[518], however, the ALI Principles do not offer additional insight into what the judicial role should be at the settlement approval stage and how he must exercise it.

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[514] *Grunin*, *supra* note 115 at para. 11 ("Only upon a clear showing that the district court abused its discretion will this court intervene to set aside a judicially approved class action settlement.").

[515] See *supra* footnote 79.

[516] See *supra* text accompanying footnotes 376ff.

[517] *ALI Principles 2010, supra* note 79 at para.3.06.

[518] *Ibid* at para. 3.07.

In the Canadian common law provinces, the judge's role at the settlement approval stage is considered to be one of protection of the interests of absent class members.[519] In the Indian Residential Schools Settlement approval decision, Justice Winkler, then-judge of the Ontario Superior Court of Justice, aptly described his role and obligations:

> The court has an obligation under the *Class Proceedings Act, 1992*, […] to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a matter that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA.[520]

In Quebec civil law, there is no equivalent to the common law notion of fiduciary relationship or duty. Courts have characterized the role of the reviewing judge in a class action settlement context as one of "protector"

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[519] *Baxter*, *supra* note 208 at para. 12.

[520] *Ibid*.

of absent class members, and even "ombudsman" or "ombudsperson" in certain cases.[521]

Upon consideration of a proposed settlement in a recent class action proceeding launched by former students of a Montreal private boys-only school, for abuse alleged to have taken place there by former professors, the Quebec Superior Court judge Gagnon interestingly noted that:

> The discretion of the Court and its authority […] cannot be fettered by agreement of the parties.
>
> […] the Court can and will ratify a settlement agreement only if it is in the fair and best interests of the group members, and if it does not contravene the law nor public order.
>
> *As an ombudsperson, the Court must be particularly attentive to the rights, obligations and concerns of the group members*, most of them unheard and imperfectly aware of the court proceedings.[522] [italics added]

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[521] See *Brochu*, *supra* note 248 at para. 41; *A.P.E.I.Q. v. Nortel Networks*, EYB 2007-124196 (C.A.), at para. 32 ["*A.P.E.I.Q.*"] (referring to the role of "guardian" and "protector" of "members' rights"); *Doyon v. Fédération des producteurs acéricoles du Québec*, [1997] J.Q. no. 3126 (Qc. Sup. Ct.), at para. 13 ("ombudsman"); *Hotte v. Servier Canada inc.*, *supra* note 377; *Rouleau v. Placements Etteloc inc.*, J.E. 99-938 (S.C.); *Brochu v. Québec (Société des loteries)*, J.E. 2003-1295 (S.C.). But see *Spieser c. Canada* (P.G.), EYB 2009-163643 (Sup. Ct.), at para. 20 (referring to judge as "fiduciary" in relation to Article 1016 C.p.c.).

[522] *Selwyn House*, *supra* note 213 at paras. 62-64.

Supporting this role of "ombudsperson" was a reference to an article published by Superior Court Ginette Piché, discussing the role of the judge in class action matters:

> […] The representatives cannot act alone. They must be able to count on the judge's presence and responsibility to see to the interests of absent class members. It is as if there was a lawyer in front of the representatives.
>
> […]The judge must impartially supervise and control the conduct of the proceedings in order to protect the rights of absent class members. She must always keep in mind and seek to enforce the interests of absent class members, primarily, over and above the interests of the representatives. One must always remember that this representative pleads in the name of another and not for himself. The judge must, accordingly, always assure that the "absents are protected."[523] [translation by author]

For law Professor Pierre-Claude Lafond, this duty of protection is required to best scrutinize adequacy of representation at all stages of the action:

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[523] Ginette Piché, "Un premier rôle pour le juge", in Alain Prunijer & Jacqueline Roy eds, *Les recours collectifs en Ontario et au Québec, Actes de la première conférence Yves Pratte*, (Montréal : Wilson & Lafleur, 1992) 141 at 149-50, cited in *Selwyn House*, *ibid* at para. 65.

> The adequate representation by the representative is appreciated not only at the stage of authorization. From the final judgment must emanate a process in which we have the assurance that the interests of absent class members were effectively expressed and appreciated by the Tribunal. The Tribunal has a mission to constantly control the representative's activities throughout the procedure, in order to guarantee the adequate character of the class members' representation, and correct it if inadequate.[524] [translation by author]

Therefore, in all my focus jurisdictions, the settlement judge has a tremendous responsibility given the nature of the class action and class members' frequent ignorance about the class action's existence and settlement. But with limited knowledge about the case and proposed settlement, can this judge really be expected to engage with all the substantive provisions of the settlement and highlight its problematic areas or any red flags signaling unfairness? A close study of the Canadian and American caselaw and doctrine has revealed that many judges simply end up relying on the representations made by counsel and presuming the settlement to be fair, reasonable and adequate.[525]

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[524] Lafond, "Le recours collectif", *supra* note 74 at 448.

[525] See *supra*, text accompanying footnotes 475 and 476. Also see notably Christopher R. Leslie, "The Significance of Silence: Collective Action Problems and Class Action Settlements" (2007) 59 Fla. L. Rev. 71 at 1055 ["Leslie, The Significance of Silence"]. This

Judges are not the only ones who can and do protect class members – present or absent. As previously discussed, class action representatives have duties of protection at common law, in light of their fiduciary relationship with class members.[526] Class counsel similarly have fiduciary duties to class members, and not just to the named plaintiffs, to achieve fairness in class action settlements.[527] They are expected to act as lawyers responsible for their client's case, and must have constant regard for the interests of the class.

Accordingly, while judges have a great responsibility and related discretionary powers at the class action settlement approval stage, this responsibility is a shared one with the other fiduciaries of class members. The judge's role of protector of absent class members should remain, but this role should be better defined to attenuate the pressure that is felt by the judges, and to best guarantee fairness of process and outcome for all those concerned by the class action settlements. I propose below three generally-framed reform hypotheses applicable to the role of the settlement judge.

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suggestion is further supported by the data from my interviews of judges, further explicated in Chapter IV *infra*.

[526] *Poulin*, *supra* note 329 at para. 62 ("A representative plaintiff must have a general understanding of the class action procedure and the nature of the lawsuit in order to instruct counsel. His responsibilities to other class members are akin to that of a fiduciary. The motion judge correctly identified factors that militated against Mr. Poulin acting as the representative plaintiff.")

[527] See Cramton, *supra* note 71 at 822 ("Class action lawyers ... are their own clients in the sense that their fiduciary responsibilities to class members are what they determine them to be in the absence of court supervision and scrutiny"); Sande Buhai, "Lawyers as Fiduciaries" (2008-09) 53 St.Louis U.L.J. 553 at 555 ("Agency arises in relationships between client and attorney, employer and employee, partnership and general partner, and corporation and officer, among other contexts"). Also see *R. v. McNeil*, [2002] 3 S.C.R. 631, which states that a lawyer has a fiduciary duty to his client, including a duty of loyalty.

III. REFORM HYPOTHESES RELATING TO THE ROLE OF CLASS ACTION SETTLEMENT JUDGES

What reforms should be implemented relating to the role of the settlement judge? Reforms have been proposed in the U.S. literature, but they have mostly focused on participation by third parties as adversaries to the fairness hearing, "to step into the adversarial void".[528] The proposals, essentially, have suggested varied types of court-appointed guardians.[529] The *Manual*, notably, interestingly suggests that "the judge […] have a court-appointed expert or special master review the proposed settlement terms, gather information necessary to understand how those terms affect the absent class members, and assist the judge in determining whether the fairness, reasonableness and adequacy requirements for approval are met."[530]

While I find these proposals interesting and appropriate, I prefer to leave the evaluation of fairness in the hands of the judges, whom I believe have all the tools and skills to conduct that evaluation.[531] I henceforth

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[528] William B. Rubenstein, "The Fairness Hearing: Adversarial and Regulatory Approaches" (2006) 53 UCLA L. Rev. 1435 at 1445 ["Rubenstein, Fairness Hearing"]. Also see Piché *supra* note 380.

[529] As Rubenstein explains, "[t]he proposals generally [imagine] the guardian as both an adversary, arguing against class counsel in legal proceedings, and a regulator, watching class counsel settle the case and assessing her performance in this function. I am sceptical that one overseer will necessarily possess both adversarial and regulatory skills, […]", *ibid* at 1452.

[530] *Manual*, *supra* note 12 at para. 21.632, cited in Rubenstein, *ibid* at 1446.

[531] For a similar view, see Hensler et al., "Class Action Dilemmas", *supra* note 15 at 485 ("[I]t is judges who hold the key to improving the balance of good and ill consequences of damage class actions"). Other scholars, on the contrary, have argued that "judges are not well equipped to undertake specialized investigatory oversight of the settlement process." See Rubenstein, *ibid* at 1473. Also see Miller, "Competing Bids", *supra* note 472 at 634 ("Judges face significant obstacles in carrying out the task of evaluating proposed settlements."); Coffee, "Class Action Accountability", *supra* note 218 at 438 ("Although

hypothesize about a revised role for the settlement judge, framed on the one hand by a revised standard of settlement fairness (discussed in Chapter III) and a detailed settlement approval process (discussed in Chapter I).

Appropriately revisiting the judge's role in class settlement approval is a great challenge. Three preliminary remarks are mandated.

First, certain critics could argue that the judge's role must vary – even only slightly – at each stage of the review and approval of a proposed class action, according to the objectives of each of the stages. At the settlement negotiation stage, the judge – if involved at all – would be a settlement facilitator, encouraging the parties to conclude the long-awaited settlement, to end the litigation and save costs and time. This role would come into conflict with the role of approval, as the judge would feel pressured to approve a settlement he has encouraged. At the preliminary fairness hearing, the judge would carefully examine the settlement, weed out potential problem areas, point out and debate red flags or problematic provisions, ask questions, be inquisitive, and generally act as advocate for the class. At the final fairness hearing, the judge would thoroughly analyze the final proposal to settle, hear the final representations by the lawyers, hear objectors, and decide in a more adversarial stance. At the settlement implementation/administration stage, the judge would become an administrator or manager, seeking to ensure the best and fairest outcome to the settlement.

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many reforms are possible and could succeed, only one is sure to fail: reliance on trial court scrutiny of the settlement."); Issacharoff, "Class Action Conflicts", *supra* note 243 at 829 ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members.") Also see *supra* text accompanying footnote 473ff.

Other critics could argue that the role of the judge should vary depending on the kind of class action case being considered. For instance, in larger and more complex cases in which compensation is afforded to a very large class, the judge could arguably be required to be more inquisitorial than required in smaller, simpler class action cases. A concrete example would be the case in which thousands of individuals are physically injured by a chemical component emanating from a neighbouring plant. In that instance, one could argue that the settlement judge should be required to be extremely sensitive to the rights of each and every individual member, and much more so than he would be in a class action case filed for hidden bank charges, in which individual compensation is likely to be inferior to $10 per class member.

These critics are valuable, but unrealistic. Approving class action settlements is a difficult and unpleasant task for the judges. Their traditional role feels inappropriate to this task, and judges generally feel ill-equipped to evaluate the agreements, in part because the standard of fairness is so highly subjective. Adding uncertainty and variability to their required role hardly feels ideal. Accordingly, the suggested role should be uniform for all stages of the action and types of cases.

As a second remark, the hypotheses I propose do not – and cannot – properly consider the subjective variables that influence the judge's involvement in the case and evaluation of proposed settlements, such as one's personal temperament and abilities, the class action case and settlement's importance for the public, the efficacy of parties and counsel in presenting their case, etc.[532] These variables exist, and are likely to influence the judge's decision to approve or deny a proposed settlement.

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[532] See e.g. Brooks, *supra* note 437 at 89.

As a third and last remark, I react to a citation dating back more than thirty five years ago, from one of the instigators of the American class action suit, Adolf Homburger. In it, he addresses the role of the class action judge, outlining his most important responsibilities:

> The most distinctive feature of class litigation […] may be the uncommonly active role which the judge must play in the control and supervision of the proceedings. The public interest in the prosecution of a class action is far greater than in ordinary civil litigation. It is the court's function to protect that interest as well as the interests of the absent members of the class. The successful management of a class action, therefore, requires a procedure that leans more toward court-prosecution than ordinarily is the case in the American system.[533]

This extract is hardly outdated considering that it contains key elements which directly relate to the reformed role of the settlement judge. I push Homburger's statement one step further to adapt it to the contemporary class action reality of settlement.

Hence, in my view, the class proceedings rules and judicial practice should require that reviewing judges (1) maintain a steadily "active" role in class proceedings; (2) seek to protect the interests of not only class

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[533] Adolf Homburger, "Private Suits in the Public Interest in the United States of America" (1973-4) 23 Buff. L.Rev. 343 at 349.

members (particularly absent ones), but also those of the defendants and the public; (3) court-prosecute the class action settlement consistently with the inquisitorial tradition, rather than properly "case manage" it, and be a "searcher of solutions" when settlements are achieved and are asked to be approved to be made effective, in line with a more conciliatory approach to adjudication. These reform hypotheses are consistent with the governance principles I propose involving inquisitorial and transparent judicial practices and the respect of class action law objectives.

i. The Active and Involved Judge

The new class action reality is that most class actions settle.[534] "[P]laintiffs and defendants come to court holding hands"[535], and courts are asked to scrutinize the parties' proposed settlement. Whereas judges used to rely on the parties to frame disputes and on legal standards to help resolve them, "overcrowded dockets and overzealous litigants have led judges away from this passive role".[536] Judges have begun taking a more active role. In class action cases, and their out of court resolution, they have also embraced this new role.[537] With this role, judges protect the interests of absent class members more closely, and can balance these interests with

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[534] See *supra,* Introduction, text accompanying footnote 5ff.

[535] Erichson, *supra* note 460 at 1985.

[536] Molot, *supra* note 30 at 29.

[537] See e.g. on the new role : *Pharmascience Inc. c. Option consommateurs*, (2005) J.Q. no. 4770 at paras. 30, 39 (C.A.), ("Within the mechanism of filtering and verification, the judge must, if the allegations of fact appear to give rise to the rights claimed, grant the motion and authorize the recourse; evidence will not be required in all cases…[T]he amendment to Article 1002 C.C.P. fits perfectly in the new environment created by the reform… which increases the level of intervention by the Court in the management of the proceeding in order to assist in bringing it to the essential step of the hearing on the merits…"). Similarly, in the U.S., the *Manual for Complex Litigation* has also steadily encouraged more active pretrial involvement by the trial judge in the development of the case; see *Manual, supra* note 12.

those of the class representative, of other members of the class and of the defendant.

Certain scholars argue that judges must be active and involved, especially in achieving finality for the parties in the form of settlement.[538] They argue that when judges take on an active role, the parties benefit.[539] In fact, being active contributes to the settlement dynamic.[540]

Whether the greater involvement of judges in encouraging and achieving settlements is *per se* a positive development remains unclear and is, of course, another topic altogether. Meanwhile, I have suggested above that in specific instances of "complex" class action cases, a different judge – a negotiations judge – should structure settlement negotiations, on the one hand, and adjudicate the proposed settlement – a settlement judge, on the other.[541] In my view, both settlement judges and negotiations judges should be equally active to best benefit the parties.

In the class action context, judges are, in fact, naturally led to be more active and involved, due to the public interest nature of this kind of litigation, and to its length and complexity. This natural propensity to become more involved and active is even greater at the stage of evaluation of the fairness of proposed settlements. There is no contradiction of the

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[538] Marjorie O. Rendell, "What is the Role of the Judge in Our Litigious Society?" (1995) 40 Vill. L. Rev. 1115 at 1121.

[539] *Ibid*.

[540] Thomas D. Lambros, "The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era" (1989) 50 U. Pitt. L. Rev. 789 at 797 (quoting United States Magistrate Judge Wayne Brazil in Wayne Brazil, *Settling Civil Suits* (1985)). Also see Thomas D. Lambros, "The Judge's Role in Fostering Voluntary Settlements" (1984) 29 Vill. L. Rev. 1363.

[541] See *supra*, text accompanying footnotes 246ff.

proposed deal, and the information relative to it is slim and filtered by counsel. Hence, at that stage, judges should actively address and discuss the merits of the case, the extent of the injury at stake, the conduct of the negotiations, and any and all elements relinquished in the settlement negotiation process. They should also actively engage in ascertaining the substantive and procedural elements of fairness of the proposed settlement.

ii. The Judge as Protector of the Interests of Absent Class Members, Representatives, Defendants and the Public

Class action judges have a responsibility to protect absent class action members, which translates into a fiduciary duty toward these members in the common law systems. In civil law systems such as Quebec's, the common law concept of fiduciary duty or responsibility has no equivalent.[542] Because the civil law concept of mandate does not apply to the relationship between the judge and the parties to a civil action, courts have referred to the judge as a protector of absent class action members.[543] In this chapter, I argue in favour of an enlarged duty of protection, but not a fiduciary duty *per se*. This enlarged duty of protection will apply not only to absent class members, but also to the defendants and to the public.[544]

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[542] *Supermarché A.R.G. Inc. v. Provigo Distribution Inc.*, [1995] R.J.Q. 464 at 492-93, 504-05 (C.S.).

[543] Lafond, *Rôle du juge, supra* note 5 at 44 ff.

[544] For a similar viewpoint, see Lazos, *supra* note 5 at footnote 54 (where she notes that several authors "have emphasized that class action litigation should seek to promote the public interest as well as the aims of the individual class members."); Menkel-Meadow, "Ethics", *supra* note 13 at 1187 ("The public ought to also have an interest in how ethics rules are made and enforced.").

At the outset, while the characterization of the common law judge as a fiduciary of absent class members is coherent with the principal duty of fiduciaries to "look out for the interests of persons in a vulnerable position, even when no one else tells [you] to do so"[545], it is not coherent with the traditional common law of agency. Indeed, the common law provides that "fiduciary relationships form where one party ('the fiduciary') acts on behalf of another party ('the beneficiary') while exercising discretion with respect to a critical resource."[546] As explained by Professor Brummer:

> […] the description of the judge as a fiduciary is incongruous with basic principal-agent relationships usually indicative of such duties. Judges are not agents of plaintiffs, traditionally conceived. There is neither a contract nor a pledge of loyalty to plaintiffs; if anything, they act on behalf of the state and larger civil society.[547]

Another incongruity with the reference to fiduciary law notions in class action theory is the fact that the alleged fiduciary's responsibilities do not relate well with the judge's role as finder of the truth. Indeed, acting as a fiduciary necessarily involves choosing to take sides with the beneficiary.

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[545] Issacharoff & Nagareda, *supra* note 218 at 1708.

[546] Brummer, *supra* note 500 at 1064.

[547] *Ibid*. The attribution of a fiduciary duty to the reviewing judge has also been criticized by Professor Samuel Issacharoff: "in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action." See Issacharoff, "Class Action Conflicts", *supra* note 243 at 808.

However, the judge's role and responsibility as truth-finder requires that he remain neutral at all times, *without* taking sides, a role more consistent with a duty of protection.

When parties agree on a class action settlement, they agree that it is fair to each of their interests in each of their respective individual regard. Settlement fairness is then highly subjective. When judges evaluate settlement fairness, they balance the rights and interests of all settlement proponents. The conception of settlement fairness must necessarily be much more objective. To best preserve objectivity at that stage, the judge should stay as neutral and conciliatory as possible. The lack of involvement in settlement structuring helps preserve neutrality in that regard.

The nature of the class action involves judgments against parties who are not before the court. Hence, when courts are asked to review a proposed class action settlement, the context naturally requires that they protect the rights of absent class members who are more vulnerable to ensure the respect of their interests. But class members are already protected by class counsel and representatives, whom, at common law, are their fiduciaries. Hence, reviewing judges should protect absent class members by closely monitoring adequate representation and ensuring that the outcome will promote the respect of these members' interests and of class action law goals.

Importantly, judges should recognize, ascertain and protect the interests of not just the class members, but of the other class action actors and their need to obtain a fair settlement. When red flags are raised suggesting collusion or improper reasons for settlement, the protection of the defendant's interest should, this time, justify the exercise of increased

judicial scrutiny.[548] This assertion is supported by the recognition, by prominent class action law scholars, that "the plaintiff's bar is stronger and more cohesive than ever, and this strength is reflected in the large number of high-dollar aggregate settlements."[549] In the face of such increasing power being held by the plaintiff's bar, one must be cautious to evaluate and reflect upon the impact of such large-scale class settlements on the defendants.

In fact, achieving fair settlements benefits plaintiffs, defendants and society at large. Fairness will lead to the greater trust and confidence of taxpayers in the civil justice system. That is why the public's interest in a fair settlement should be considered, notably through the respect of the class action objectives of deterrence and behavior modification. Interestingly, this hypothesis is supported by the judicial practices of the judges I interviewed, who mentioned their concern with the public's confidence in the legal system.[550]

There are also examples of class action cases in which the proposed settlement was approved upon consideration of the class action law objectives. Indeed, the Canadian *Vitapharm* settlement of a class action alleging a conspiracy about the price of vitamins was one such case.[551] The

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[548] See e.g. Menkel-Meadow, "Ethics", *supra* note 13 at 1187 ("The public ought to also have an interest in how ethics rules are made and enforced.")

[549] Issacharoff & Klonoff, *supra* note 6 at 108.

[550] See *infra*, Chapter IV for further details about these qualitative interviews. For instance, see the following extract from Interview No. 9: "[…] society also has an important interest in maintaining respect for the adjudicatory system, for if the public comes to believe that all this is only for the benefit of lawyers, we will all be worse off. I am worried that the […] public largely does not accept the legitimacy of class actions for these small-recovery cases, and thinks they serve only to line the pockets of lawyers […]".

[551] *Vitapharm, supra* note 139.

proposed settlement provided that the defendants would contribute $102,782, and that the end consumers of vitamins, who benefited from a *cy près* distribution, would not receive individual awards. The outcome of the class proceeding through settlement had a modest effect on class members, whereas the representative plaintiff and class counsel were at considerable risk in their endeavor to file the case. The court concluded that access to justice was promoted, and deterrence and behavioral modification of faulty defendants likely. It approved the settlement.[552] These objectives, accordingly, are in my view fundamental and must be considered at the settlement review and approval stage, such that the interests of the members, defendants and the public are respected.

iii. The Inquisitorial … But Conciliatory Judge

In this chapter, I have argued that the class action settlement context cannot guarantee fairness of process and outcomes when civil judges act in conformity with their traditionally adversarial role. Adversarial judges embrace and appreciate the confrontation of opposite ideas and assume that the truth will arise from it.[553] By contrast, inquisitorial judges explore and sift through the evidence, not with a view to ascertaining what evidence should be heard to "generally understand the case," but rather with a view to requiring the necessary evidence to "reach a *justifiable* decision" [italics added].[554] Accordingly, these judges are preoccupied

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[552] *Ibid*.

[553] See *supra* text accompanying footnotes 432ff.

[554] Geoffrey C. Hazard, Jr., "Discovery and the Role of the Judge in Civil Law Jurisdictions" (1997-98) 73 Notre Dame L. Rev. 1017 at 1022. Also see e.g. Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World" (1996-97) 38 Wm. & Mary L. Rev. 5 (where the author argues in favour of rethinking the goals the American legal system should serve and the methods used to achieve those goals; precisely arguing against the adversary system).

with the search for the "truth" and what is "just"[555], a responsibility lawyers must not impede upon.

In the peculiar context of class action settlement review, where settlement parties are more vulnerable and their rights more fragile, settlement judges (and negotiations judges when involved) should be principally preoccupied with finding the truth and what is "just" about the settlement. They should assume that the truth will arise from a thorough review of the relevant evidence in light of what they believe are the true interests and advantages of the settlement to class action members. To find the truth, judges should become closely involved in defining the legal and factual issues, and verifying that they are addressed adequately in the settlement agreement. They should never rely entirely on the lawyers to gather, develop and interpret the evidence.

Class action representatives should be asked to explain why they agreed to the proposed settlement. Arguments from objectors and attorneys on file should be welcomed and carefully evaluated. This more "paternalistic," activist and outspoken judicial role will certainly assist in better preserving the rights of absent class members, and the respect of their interests.[556]

In 2006, UCLA Professor of Law, William Rubenstein published an article about the role of the judge at the fairness hearing stage, advocating the use of a combined adversarial and regulatory approach.[557] In it, he rejected the inquisitorial mode, arguing that American judges are not "particularly

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[555] See e.g. Frankel, *supra* note 439.

[556] See Kotz, *supra* note 443 at 41.

[557] Rubenstein, "Fairness Hearing", *supra* note 528.

good at undertaking or overseeing factual investigations [of the proposed settlement, and not] conceptualized as factual investigators."[558] More specifically, he explained that judges are well equipped to evaluate substantive law questions, presented in an adversarial fashion, but that they, in essence, cannot investigate.[559] In support of the latter proposition, he argued that judges have no formal training in assembling and organizing facts, that they do not "possess the tools of the investigatory trade," [560] and that since they are not specialized in class actions, they do not "know what it was they were looking for."[561] In addition, he noted that judges are "situated within an institutional framework that expects them not to perform this function."[562]

This approach is, in my view, too simplistic and generalized. It suggests that class action judges, who before becoming judges generally have many years of experience practicing law, cannot ask questions, raise issues, and review documents. Furthermore, it assumes that they are not knowledgeable about or comfortable with class action litigation, when that kind of litigation has become so popular that class action divisions with specialized judges have been instigated in most courthouses throughout North America.

The approach also wrongly assumes that because the civil justice system does not expect judges to ask questions and act inquisitorially, they should not do so. Acting inquisitorially requires sifting through the

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[558] *Ibid* at 1472.

[559] *Ibid*.

[560] *Ibid* at 1473-74.

[561] *Ibid*.

[562] *Ibid* at 1474.

evidence, absorbing oneself in it, mastering the proposed deal's principal provisions, and asking questions – aloud or not. These tasks can properly be effectuated by the judge evaluating class settlements. And, in any event, when a judge acquires full knowledge and understanding of his case, he "knows what to look for," and what questions must be asked. Hence, I do not subscribe to the suggestion that judges cannot properly evaluate and approve class action settlements.

Both the supervision of proposed settlements, and the evaluation and approval of proposed class action settlements require a certain amount and degree of "judicially initiated inquiry."[563] This inquiry, however, is distinct from the judge's role as case manager of the class action litigation. Indeed, case management is not required at the settlement stage, as the settling parties have already organized their case, concluded the agreement and presented it for approval. Nor is it welcomed at that stage, as it creates a "potential for arbitrariness," which must generally be absent from the class settlement context.[564]

In sum, to reach fairness of process and outcome in class action settlements, and transparent practices,[565] judges should safeguard the interests of absent class members by acting as their protectors. In carrying

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[563] Rowe, *supra* note 423 at 211.

[564] Elliott, *supra* note 425 at 317 ("[…] when judges make *legal* decisions, the parties have an opportunity to marshal arguments based on an established body of principles, judges are required to state reasons to justify their decisions, and appellate review is available. None of these safeguards is available when judges make *managerial* decisions. […] discretionary managerial decisions may influence the outcome of litigation in ways that are arbitrary because judges act without the procedural safeguards that accompany decisions on the merits.").

[565] For a similar view-point that practices should be transparent, see Cox, *supra* note 19 at 524 ("Simply stated, the courts must not only become active in their reviews, but also must make the overall process more transparent.")

out their role of protection, they should principally monitor adequate representation by class representatives and counsel. They should deny proposed settlements that concern class members who are not adequately represented. In the case of inadequate representation, they should only accept to review the proposed settlement *de novo* if representation is corrected. Defendants' interests should be considered particularly where there are red flags or problematic provisions of the settlement suggesting abuse of process, or where there is a specific public interest in having the class action settlement approved as deterrence or for behavioural modification objectives.

In addition, judges should be proactive and creative in their inquisitorial assessment of proposed class action settlements. They should require enough evidence to reach a justifiable decision, and should become personally involved with scrutinizing the settlement agreement, exploring and questioning the evidence, interviewing witnesses if required.[566]

Finally, because this hypothesised role imposes a greater burden on the judges, it should be balanced off with a duty to act conciliatorily, such as to ensure that settlements are not discouraged. Judges should thus be required to participate in a more flexible and creative search for solutions regarding proposed settlements, always seeking to find the truth (and what is "just") about these settlements. In doing so, they should cooperate with the negotiations judge, in complex cases, to best evaluate settlement fairness and ensure that members are fairly compensated.

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[566] For a similar proposition, see Resnik, "Litigating and Settling", *supra* note 36 at 860.

CH. III: CLASS ACTION SETTLEMENT FAIRNESS[567]

Class action settlements are agreed upon in a multi-party context in which class members' interests must be closely protected. Accordingly, each class action settlement agreement must be reviewed and approved by a judge, in light of a standard of fairness supported by a list of factors relevant to its determination. But the judge's mind is a secret place. Most judgments fail to reveal exactly how settlement fairness is appreciated by the courts, or what indicator of fairness was most decisive in their decision to approve or deny a proposed deal. How do judges evaluate whether a class action settlement is "fair" or "unfair" to class members? What standard and factors are most appropriate and useful to fairness reviews? How are procedural and substantive fairness evaluated and respected throughout the review process?

The standard of fairness is inherently indeterminate and subjective, and has been criticized by scholars as "unfit" to adequately assist the courts in determining whether the settlement is in fact fair.[568] These scholars have found that courts often appear predisposed toward approval of class settlements, merely referring to the fairness standard to support their

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[567] I published an article discussing the contents of this chapter as a preliminary work to this thesis. Hence, this thesis's Chapter III reproduces significant portions of the article: see Piché, "Reappraisal", *supra* note 383.

[568] Rand Report, *supra* note 15. The Rand Report aptly discusses some of the problems incurred relative to the courts' failure to "adequately supervise the approval of settlements". It founds its conclusions in part on ten case studies of U.S. class actions. Also see: Rubenstein, "The Fairness Hearing", *supra* note 528 at 1438, 1444-45 (noting that authors have essentially given up on the judiciary's ability to provide proper class action oversight); Cramton, *supra* note 71 at 817 (arguing general standards such as "fair" or "reasonable" do not properly help judges scrutinize proposed settlements).

mostly intuitive determination.[569] In fact, recent empirical data reveal that approximately ninety percent of federal class action settlements are approved without substantive changes.[570]

This phenomenon cannot be taken lightly. When they are approved judicially, class action settlements are taken out of the purely private context to be placed in the *quasi*-public context.[571] Their fairness, accordingly, concerns not just the settling parties, but the absent class members and the public in general. Absent class members are concerned because they will be bound by the settlement. The public is also concerned because class action litigation – and its related settlements – can ensure greater compliance with society's laws and regulations, promote the efficient use of scarce judicial resources,[572] and ultimately assure greater access to justice.[573]

Even if the genuine and voluntary settlement of disputes is in theory a good thing, fairness cannot be presumed simply because the parties' lawyers have voluntarily subscribed to the settlement.[574] The class action

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[569] Principally see Puckett, *supra* note 34 at 1279 (also explaining that judicial review of proposed settlements is "inherently futile"). On the concept of decision-making based on a "hunch" or intuition, see Joseph C. Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions" (1929) 14 Corn.L. Q. 274.

[570] Willging et al., *supra* note 7 at 141.

[571] See e.g. *Bank of Am. Nat. Trust & Savings Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986), para. 22 ([…] a motion or a settlement agreement filed with the court is a public component of a civil trial. As in the cases involving trial rulings or evidence admitted, the court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate.").

[572] *Eisen*, *supra* note 57 at 186 (Douglas J., Dissenting).

[573] Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LL.M. Thesis, University of Toronto Faculty of Law, 2009) [unpublished].

[574] Owen Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073 ["Fiss, Against Settlement"].

is a device that involves great numbers of "client" class members that are often widely scattered. Individual class members may have had little or no contact with their lawyers. The judicial process of settlement review and approval must ensure that class members receive compensation for their claims in a fair and efficient manner, that all the interests at stake are protected, and that the integrity of the judicial process is preserved.

Hence, in this chapter, I critically reappraise the current standard for judicial approval of class settlements, and hypothesise about what I believe to be an improved definition or standard of class action settlement fairness. As such, I first outline the currently applicable legislative standards for the judicial approval of class settlements in Canada and in the United States. Second, I discuss fairness hearing doctrine in American and Canadian courts, and third, re-categorize the current factors useful to a review of fairness in procedural and substantive fairness categories. This re-categorization ultimately supports my suggested definition of class action settlement fairness. Fourth, I address fairness in other, non-class action contexts. Finally, I suggest that the class proceedings laws be reformed to require settlement judges to leave aside the existing lists of fairness factors and focus more largely on ensuring that substantive and procedural fairness is present for the class as a whole.

I. FAIRNESS HEARING DOCTRINE IN NORTH AMERICAN COURTS

Court approval is required to effect class settlements in the North American federal and provincial class action statutes of my target jurisdictions, but these statutes fail to provide precise guidance as to how the duty of oversight should be discharged or of which indicia are more determinative in the decision to approve or deny settlements. Hence,

courts have developed a framework for the judicial approval of class settlements. In this section, I critically review this framework and the various factors that are used to gauge fairness, reasonableness and adequacy of class settlements, as well as a few cases that have denied proposed settlements based on unfairness. I propose a re-classification of these factors into differently framed procedural and substantive fairness categories, and a revised approach to the judicial review and approval of class action settlements.

a. "Fair, Reasonable and Adequate" or "In the Best Interests of the Class"

In the United States, Rule 23(e)(2) F.R.C.P. establishes that a class action settlement must be "fair, reasonable, and adequate" to be approved judicially.[575] In Canada, there is no equivalent statutory provision, such that courts have had to develop a similar jurisprudential standard for the judicial oversight of class action settlements.[576] In the common law provinces, the generally accepted standard is the *Dabbs No. 1* test of whether the settlement is "fair, reasonable and in the best interests of the class as a whole."[577]

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[575] See also Puckett, *supra* note 34 at 1276 (citing the unpublished Southern District of New York case of *Neuwirth v. Allen*, 1961-1964 C.C.H. Fed. Sec. L.Rep. 91,324 (N.Y. Dist. Ct. 1964), aff'd 338 F.2d 2 (2d Cir. 1964) as the origin for the "fair, adequate and reasonable" test and American courts' current approach to ascertaining the fairness of class settlements).

[576] *Dabbs No. 1*, *supra* note 11.

[577] *Ibid* at para. 11. See also *Smith Estate v. Oriet*, [2010] O.J. No. 873 at para. 18; *Ali Holdco Inc., supra* note 18 at para. 24ff.; *Bodnar, supra* note 345; *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302; *Killough, supra* note 11; *Rideout supra* note 11 at para. 138 (adding an element of "good faith" to the test: "The settlement must be reviewed from the standpoint of its fairness, reasonableness, whether it is in the best interest of the Class as a whole, and *whether it was made in good faith*" [italics added]); *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada Ltd,* [2004] O.J. No. 1270 (Sup.Ct.J.) at para. 58 (where the class

In the Canadian civil law province of Quebec, class action settlements are also reviewed for their fairness, reasonableness and adequacy. While earlier Quebec courts appeared to approve settlements more intuitively without judicial guidelines,[578] they later formally endorsed the Ontario *Dabbs No. 1* test, using a "reasonable, fair ("*équitable*"), appropriate and in the best interests of class members" standard.[579] Throughout the years, however, the Quebec courts struggled with the choice of words appropriate to translate the *Dabbs No. 1* Test into French. They did not use the most appropriate words to do so. Accordingly, they created the following two additional criteria for approval: "appropriateness" and

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settlement was held to provide a "reasonable alternative to those class members who do not wish to proceed to trial", and to be "fair, reasonable and in the best interests of the class").

[578] See e.g. *Fortier v. Québec (P.G.)*, EYB 1991-76185 (S.C.) (where a class settlement was approved on the vague grounds that it "appear[ed] reasonable and acceptable"); *Delaunais v. Québec (Procureur Général),* (unreported, January 11, 1983, Qc. Sup. Ct.) (certification decision); [1992] R.J.Q. 1578 (Sup.Ct.) (settlement approval hearing) ["*Delaunais*"] (where a settlement was rejected because it did not "appear to be fair" and was contrary to the underlying principles of the class action regime because it did not provide an "adequate and satisfactory compensation for the prejudice suffered", since approving the transaction would imply that the absentee members have fought "for a mere symbol.") [both extracts translated by author].

[579] *Pelletier, supra* note 11 at 10 (Conclusions). Also see *Landry*, *supra* note 11 at para. 31; *Roberge v. Capitale Assureur de l'administration publique*, 2005 CanLII 14227 (Qc. Sup. Ct.); *Option consommateurs v. Assurances générales des Caisses Desjardins inc.*, [2005] J.Q. no. 13243 (Qc. Sup. Ct.) ["*Option consommateurs*"]; *Bouchard v. Abitibi-Consolidated*, REJB 2004-66455 (Qc. Sup. Ct.); *Union des consommateurs v. Bell Canada* [2004] J.E 2004-1206 at paras. 26, 29, 59 (Qc. Sup. Ct.) ["*Bell*"]; *Brochu v. Ajinomoto U.S.A. Inc.*, 2004 CanLII 26284 (Qc. Sup. Ct.); *Honhon*, *supra* note 232; *Page v. Canada (Procureur Général),* [1999] R.J.Q. 2709 (Sup.Ct.); *McNeil v. London Life*, REJB 1999-14523 (Qc. Sup. Ct.). All recent 2010 cases have followed the *Dabbs No. 1* factors : *Communication Méga-sat inc. c. Sharp Electronics of Canada Ltd.*, EYB 2010-179696 (Qc. Sup. Ct.); *T. (U.) c. Bishop's College School*, EYB 2010-179349 (Qc. Sup.Ct.); *Roy, supra* note 138; *Boulerice c. Bell Canada*, EYB 2010-176389 (Qc. Sup.Ct.); *Thibault v. St. Jude Medical Inc.* (C.S.); EYB 2010-172760 (Qc. Sup. Ct.); *Bibaud c. Banque Nationale du Canada*, EYB 2010-176150 (Qc. Sup. Ct.); *Brochu, supra* note 248; *Richer, supra* note 161; *Langlois c. Roy*, EYB 2010-172851 (Qc. Sup. Ct.); *Therrien c. Cie de volailles Maxi ltée*, EYB 2010-174534 (Qc. Sup. Ct.); *Mailhot c. Diabète Amiante inc.*, EYB 2010-173445 (Qc. Sup. Ct.).

"acceptability".[580] This vagueness creates uncertainty in the fairness standard applicable in front of Quebec courts.

The "fair, reasonable and adequate" standard alone has been criticized as providing little guidance about how the judicial function should be performed when scrutinizing class action settlements.[581] Accordingly, North American courts have developed several factors that they consider helpful and important in evaluating class action settlement fairness. The list of relevant factors differs slightly within different courts, jurisdictions and legal systems. It is also non-exhaustive and applies to class actions in each and every substantive area of the law.

I have summarized the list of relevant factors, for this chapter's purposes, as the "Seven Factors Fairness Test" (the "Test"):[582]

i. Judicial risk analysis: likelihood of recovery, or likelihood of success on the merits weighed against amount and form of settlement relief;

ii. Future expense, complexity and likely duration of litigation;

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[580] See e.g. *Lefrançois v. Stone Container Corp.*, 2006 QCCS 3714; *Fondation Campus Notre-Dame-De-*Foy *v. Nan Ya Plastics Corp.*, 2005 CanLII 36502 (Qc. Sup.Ct.); *Asselin v. Maytag Corp.*, 2005 CanLII 24546 (Qc. Sup.Ct.); *Honhon*, *ibid* at para. 25.

[581] See *supra* text accompanying footnote 568.

[582] For examples of Canadian cases that have considered variations of the factors included in the Seven Factors Fairness Test, see e.g. *Zopf, supra* note 115; *Schweyer Estate v. Laidlaw Carriers Inc.,* [2009] O.J. No. 5399 (Ont. Sup.Ct.J.) (Perell J.); *Dabbs No. 1*, *supra* note 11 at para. 13; *Jeffery*, *supra* note 12 at para. 18, 38; *White*, *supra* note 12; *Northwest supra* note 12 at paras. 23-24, 45. For American cases, see e.g. *Re Prudential*, *supra* note 12 at 316–324; *Grinnell, supra* note 12 at 463; *Weinberger*, *supra* note 478; *Re Corrugated*, *supra* note 135; *Girsh v. Jepson*, 521 F.2d. 153 (3d Cir. 1975) ["*Girsh*"]. The American references are cited, in part, in *Newberg on Class Actions*, *supra* note 35 at para. 11.43, and *Manual, supra* note 12 at para. 21.62, online: Federal Judicial Center http://www.fjc.gov (list of factors relevant to assessing class action settlement fairness).

iii. Class reaction: number and nature of objections;

iv. Recommendation and experience of counsel and opinion of interested persons;

v. Adequacy of representation: good faith and absence of collusion;

vi. Discovery evidence sufficient for "effective representation;" and

vii. Adequacy of notice of proposed settlement to absent class members.

The Test is designed to give courts all the necessary information to appreciate the interests of the class and of its members, the parties' respective bargaining powers, and to verify that class lawyers have acted as proper agents and that defendants are not "buying peace" by settling at too low a price.[583] While it requires that courts consider all of the factors together, it does not require that they conclude that "every factor supports a finding of fairness".[584] Some factors may be given greater weight than others in the inquiry, depending on the case.[585] Meanwhile, the evaluation of settlement fairness remains wholly discretionary.[586]

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[583] See *Manual*, *ibid* at 13.14.

[584] *Re Global Crossing Securities and ERISA Litigation*, 225 F.R.D. 436 ["*Re Global Crossing*"], cited in *Re Merrill Lynch Tyco Research Securities Litigation,* 249 F.R.D. 124 at 134 (N.Y. Dist. Ct. 2008) (a court must rather consider the totality of these factors in light of the particular circumstances). See also *Re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 4526593 at 10 (N.Y. Dist. Ct. 2007).

[585] *Parsons, supra* note 163 at para. 73.

[586] *Hanlon, supra* note 118 at 1026; *Granada Investments, Inc. v. DWG Corp.*, 962 F.2d 1203 at 1205-06 (6th Cir. 1992).

In fact, the *Seven Factor Test* comprises what have been the most obvious considerations for courts in approving settlements. It lists evidentiary indicators of the settlement's reasonableness, and refers to secondary sources that help determine whether the standard has been met. While the first four factors are relevant to the merits of the settlement – i.e., its substantive fairness, the last three raise concerns about the procedure by which the settlement was reached – i.e., its procedural fairness. The fifth factor, notably, is a critical procedural fairness factor, and requires that courts verify whether the settlement was reached after "arm's-length negotiations by counsel authorized to act on behalf of the parties".[587]

Accordingly, at first glance, the fairness factors provided in the Test appear adequate and useful to evaluate settlement fairness. On a closer look, however, it becomes apparent that they contain undefined, indeterminate and subjective concepts that do not offer determinative account of the process judges should follow, or strong indicia of which settlements should be approved or denied. The American *Manual for Complex Litigation* offers additional insight, suggesting that judges question settlements "if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys."[588] It also suggests

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[587] See e.g. *Newberg on Class Actions*, *supra* note 35; *In re Michael Milken and Associates Securities Litigation*, 150 F.R.D. 57 at 65-66 (S.D.N.Y. 1993) [*"re Milken"*]. Also see *Levin v. Mississippi River Corp*., 59 F.R.D. 353 (S.D.N.Y. 1973), aff'd 486 F.2d 1398 (2d Cir. 1973).

[588] Manual, *supra* note 12 at para. 21.632. Also see *supra* text accompanying footnotes 169ff.

that judges question settlements to which there are many objectors or to which "apparently cogent objections" have been raised.[589]

Generally, the *Manual* identifies the following three variables as affecting which factors of fairness apply and how much weight should be given to them: "(1) the merits of the substantive class claims, issues, or defences; (2) whether the class is mandatory or opt-out; and (3) the mix of claims that can support individual litigation, such as personal injury claims, and claims that are only viable within a class action, such as small economic loss claims."[590] While these variables are helpful, neither the *Manual for Complex Litigation* nor the caselaw, however, offers definite answers regarding the process used to evaluate the settlement's true worth, and adequacy, reasonableness and fairness.[591]

b. Substantive and Procedural Inquiries into the Proposed Settlement's Fairness

Two general lines of inquiry have been identified by certain U.S. circuit courts and by the British Columbia Supreme Court as necessary at the fairness hearing stage.[592] They involve a consideration of the strength of the legal claims alleged in the class action and of the negotiations by and between the settling parties and their counsel.

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[589] *Ibid* at paras. 21.62 and 21.631.

[590] *Ibid* at para. 21.62.

[591] Rand Report, *supra* note 15 at 486.

[592] See e.g. *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) ["*D'Amato*"]; *Figueroa, supra* note 98; *Jeffery*, *supra* note 255. Actually, the procedural and substantive fairness dichotomy originates from Judge Friendly in *Weinberger*, *supra* note 478 at 73. These lines of inquiry were also reiterated by Puckett, *supra* note 34 and Lazos, *supra* note 5 at 321ff.

The "substantive fairness" line of inquiry requires a review of the settlement's objective terms, comparing them "with the likely rewards of litigation [to the class]."[593] For American judges, this inquiry comes first at the fairness hearing.[594] It mandates that the judge scrutinize the proposed settlement to review "all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated [and compare the settlement's terms] with the likely rewards of litigation."[595] In fact, the inquiry considers a range of different resolutions that may be "reasonable."[596]

There are obvious difficulties with this exercise. First, class settlements are considered by scholars to be substantively fair to the plaintiffs if they give them the "expected value of their claim if [the case] went to trial, net of the costs of trial (minus the costs of settlement [...])."[597] This concept of settlement value is inherently indeterminate due to its variables: the monetary value of the plaintiff's injury, the likelihood that the plaintiff will successfully recover for the injury at trial and the additional litigation

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[593] See e.g. *Protective Committee For Independent Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414 at 425, 88 S. Ct. 1157 (1968) ["*Protective Committee*"]. See also *Re Sony SXRD Rear Projection Television Class Action Litigation*, 2008 WL 1956267 (N.Y. Dist. Ct. 2008) ["*Re Sony*"]; *McBean v. New York (City of)*, 233 F.R.D. 377 at 382-83 (N.Y. Dist. Ct. 2006) ["*McBean*"].

[594] *Protective Committee*, *ibid* at 424-425 ("Basic to this ... is the need to compare the terms of the compromise with the likely rewards of litigation"). See also *Grinnell, supra* note 12 at 455.

[595] *Protective Committee*, *ibid*, cited in *Weinberger, supra* note 478 at 74.

[596] See e.g. *Newman v. Stein*, 464 F.2d 689 at 693 (2d Cir. 1972). More specifically, see analysis of Range of Reasonableness Golden Rule *infra* text accompanying footnotes 671ff.

[597] *Mars Steel Corp. v. Continental Illinois National Bank*, 834 F.2d 677 at para. 12 (7th Cir. 1987) ["*Mars Steel*"] (quoting *In re Gen. Motors*, *supra* note 98 at fn. 44).

expense in pursuing his legal claim to a full trial.[598] Second, judges have a limited fact-finding ability in a setting such as the fairness hearing, where the settling parties have already agreed to the settlement's terms and are no longer adverse in interest.[599] Third, the concept of settlement fairness is inherently indeterminate and hence, the task of evaluating, on a case by case basis, what the "fair" value of settlement is, is challenging.

To supplement their review of the settlement's substantive terms and, more importantly, to reduce the potential for collusion between the defendants and class counsel, courts also scrutinize the *process* by which the settlement was negotiated and concluded. This is the "procedural fairness" inquiry. In this inquiry, courts review the involvement of the class action representative in the negotiation process and verify that his motivations were aligned with those of the other class members, such that the process was fair to these members.[600] Courts also verify that the settlement "resulted from arm's-length negotiations" conducted by class lawyers with experience and the ability to negotiate in the best interests of the class.[601] These negotiations must have proceeded without coercion or collusion from counsel acting in their own self-interest.[602] Furthermore,

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[598] Puckett, *supra* note 34 at 1280.

[599] *Ibid*.

[600] *McBean*, *supra* note 593 at 383-84; *Grinnell, supra* note 12 at 463-66; *D'Amato*, *supra* note 592 at 85; *Re Sony*, *supra* note 593 at 5. See also *Malchman v. Davis*, 706 F.2d 426 at 433 (2d Cir. 1983), cited in *Hicks v. Morgan Stanley & Co*., 2005 WL 2757792, 2005 U.S. Dist. LEXIS 24890 (N.Y. Dist. Ct. 2005) at 5 ("The experience of counsel, the vigour with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves shed light on the fairness of the negotiating process").

[601] *McBean, ibid* at 384. See also *In re. Gen. Motors*, *supra* note 170.

[602] See *Weinberger, supra* note 478 at 73. See also *Re Warner, supra* note 503 at 37 (2d Cir. 1986) (where the court was held to have a "fiduciary responsibility of ensuring that the settlement is fair and not the product of collusion").

the discovery conducted must have been "sufficient" for "effective representation" of the class.[603] On this point, the Southern District of New York recently concluded that class members' interests had been effectively represented because "considerable pre-settlement and post-settlement discovery to determine the strengths and weaknesses of the case and to set a factual predicate for a proposed resolution" had been conducted.[604]

c. Scarcity of Settlement Denials

There are very few official statistics evaluating the numbers of settlement denials in Canada and in the United States, to my knowldge.[605] My impression, supported by limited empirical data or statistics,[606] is that very few settlements have ever been refused or denied by Canadian or

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[603] *McBean*, *supra* note 593 at 384. Accordingly, the issue is not how much or how little discovery has been completed by the parties. See also *infra* for a discussion of this procedural fairness factor.

[604] *Re Sony*, *supra* note 593 at 5.

[605] Nonetheless, a few American studies have discussed statistics regarding the numbers and stages at which settlements are concluded: see Brian Fitzpatrick, "An Empirical Study of Class Action Settlements and their Fee Awards" (2010) 7 J. Empir. Leg. Stud. 1 (study covering district court activity in the years 2006 and 2007, which concludes that district court judges approved 688 settlements in these two years, involving thirty three billion dollars. The study also indicated that 68% of these settlements were settlement classes); Theodore Eisenberg & Geoffrey Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008" (2010) 7 J. Empir. Leg. Stud. 248 (study found that only 57% of class action settlements in state and federal courts concluded between 2003 and 2008 were settlement classes.)

[606] Interestingly, see Emery G. Lee III & Thomas E. Willging & al., "Impact of the Class Action Fairness Act on the Federal Courts", Federal Judicial Center, April 2008, online: http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/$file/cafa1108.pdf, at 14 ("Judges approved without changes all but three of the proposed settlements. In the other three cases (14%), judges approved the proposed settlement after the parties made changes in the agreement.").

American courts. This impression is also shared by many of the judges I interviewed, as will be further discussed in Chapter IV.[607]

Interestingly, certain class settlements are first rejected as unfair, to later be approved after modifications are made to the original agreement. One example of such as case is *Burnett Estate v. St-Jude Medical, Inc*.[608] In that case, simultaneous certification and settlement approval was sought, but Mr. Justice Sigurdson refused to approve the proposed settlement, stating that he "would [normally] have approved the settlement […] [but could] not approve [it] because the possible claim for psychological injury had not […] been properly investigated."[609] In his original reasons for judgment, he explained:

> [215] I have concluded that this settlement would be reasonable to all affected if it contained some reasonable provision that those who were able to establish on medical evidence that they suffered injury to the compensable level […] received some negotiated compensation. I think that this aspect must be more fully addressed by the parties. There are no doubt many ways that my concern could be addressed by the parties, but I leave that to them. The settlement can then be brought back to court if the representative

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[607] See *infra* text accompanying footnotes 890ff.

[608] [2009] B.C.J. No. 2403. Also see original reasons for judgment *Burnett Estate v. St-Jude Medical, Inc*., [2009] B.C.J. No. 133.

[609] *Ibid* at para. 215.

> plaintiff and defendants continue to agree
> on the terms of a settlement.[610]

Leaving aside these cases where proposed settlements are first rejected, then modified and approved in their new version, final versions of proposed settlements are rarely rejected with finality. In each of our focus provinces, only a few examples of such rejections can be found. In Ontario, one of the few class action settlements rejected, to my knowledge was the one in *Epstein v. First Marathon Inc*.[611] That settlement was rejected principally because the action had been filed for its settlement value instead of its true merits, and was, therefore, considered to be a "strike suit"[612]. The settlement provided that plaintiff's counsel would receive a $190,000 legal fee upon the action being dismissed without costs, but the members received nothing! The court concluded that "to approve the settlement would be an abuse of discretion."[613]

In Quebec, the court refused a proposed settlement in *Delaunais*[614] because it seemed inadequate given that class members received nothing. In that case, the plaintiff challenged the legality of a fishing surcharge provided for in a government brochure, and allegedly supported by a regulation. The proposed settlement required that the Attorney General pay $550,000, $85,000 of which would cover the legal costs, and the remaining $465,000

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[610] *Ibid*.

[611] *Epstein, supra* note 139.

[612] *Ibid*.

[613] *Ibid.*

[614] *Delaunais*, *supra* note 578.

would be awarded to a non-profit ecology organization.[615] In another, this time highly-mediatised Quebec sexual abuse case, a motion for approval of a proposed settlement was dismissed because the proposed settlement provided that class members would not be made aware of their compensation levels until after they chose whether to participate in the projected settlement.[616] In that case, the settlement was subsequently approved, after modifications were made to the agreement.[617]

Furthermore, several class action settlements were recently denied in the United States. On August 13, 2010, the U.S. District Court for the District of Kansas in *In re: Motor Fuel Temperature Sales Practices Litigation*[618] denied a settlement, and overruled the proposed plaintiffs' motion and memorandum in support of the final approval of the class action settlement, for lack of adequate representation:

> […] the parties have not structured the proposed settlement in a way to assure that named representatives have operated under a proper understanding of their representational responsibilities to distinct subgroups within the settlement class. In addition, plaintiffs have not shown that representatives from one state can adequately represent the interests of class members who reside in different states

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[615] *Ibid*.

[616] *Selwyn House*, *supra* note 213 at paras 45-46 and 109-110.

[617] *Ibid*, 2009 Case.

[618] MDL No. 1840, Case No. 07-MD-1840-KHV.

> with presumably different laws. Accordingly, plaintiffs have not shown that the named representatives are adequate representatives under Rule 23(a)(4).
>
> The parties could restructure the proposed settlement in a way to […] if the parties choose to restructure the settlement to assure adequate representation, it appears that […] the proposed settlement would be fair, reasonable and adequate under Rule 23(e).[619]

In the end, the few denials of proposed settlements may be attributable to varied factors. Perhaps there are few denials because the factors of settlement fairness are difficult to apply as stated. Indeed, as I will further demonstrate, judges should instead prefer an approach where they leave aside the lists of factors to broaden the inquiry, and focus on both procedural fairness and substantive fairness. The few denials may also be due to the way the approval standard is formulated, and to the presumption of fairness, which will be further discussed below. In Federal Rule 23, the judge "may approve [a proposed settlement] only after a hearing and on finding that it is *fair, reasonable, and adequate* […]". Suffice it to compare Rule 23(e)'s wording in relation to alternative formulations such as the *Dutch Collective Settlement Statute*, which provides that "The

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[619] Memorandum and Order, p. 62, online: https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2007md1840-1707.

court shall reject the request [for approval of an agreement] if [the following conditions are *not* met] […]"[620]

The current tendency to approve proposed settlements is problematic because it sends a message that settlements will automatically be approved. While denials may signify that bad settlements are weeded out and that potential problems are identified at the outset, there should, in the absolute, be more settlements denials. These denials should be made public in a way to send a clear message that judges have a choice to approve or deny. Judges should not be perceived as being bound to approve proposed settlements.

II. RE-CATEGORIZATION OF THE RELEVANT FAIRNESS FACTORS

The Fairness Hearing Doctrine provides a variety of factors relevant to the fairness inquiry that have been inconsistently defined and categorized by several American courts and some Canadian courts over the past years. This subsection serves to re-categorize the Doctrine's principal factors to provide more certainty and predictability in the review process and at the fairness hearing.[621] My re-categorization will serve to explore the kinds of issues relevant to the substantive and procedural fairness inquiries. It will serve to explain what issues form part of the latter two inquiries and will make it easier for judges to set aside the lists of settlement fairness factors

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[620] Art. 3 of WCAM. The Statute is cited *supra* note 272.

[621] Donald Puckett similarly establishes a list of substantive and procedural fairness factors, in his article entitled "Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements", *supra* note 34, but my suggested categories are differently stated and contain different factors.

of each of the target jurisdictions, in favour of a larger, two-parted fairness inquiry.

a. Tracking the Merits of the Proposed Settlement: Factors Useful to the Substantive Fairness Inquiry

The inquiry into substantive fairness involves a comparison of the actual terms of the settlement with objective criteria to evaluate the proposed settlement's fairness or unfairness. While certain factors courts have considered relevant to substantive fairness are intrinsically related to the settlement's terms and substance, others are related to the parties' and counsels' opinions and reactions to the settlement's substance. Accordingly, I have re-categorized the relevant substantive fairness factors into those that are *intrinsic* to the substantive fairness inquiry and those that are *extrinsic* to this inquiry.

1. Intrinsic Factors of Substantive Fairness

a) Judicial Risk Analysis: Likelihood of Recovery or Likelihood of Success on the Merits Weighed Against Amount and Form of Settlement Relief

This first factor is said to be "by far" the most important in the substantive fairness analysis.[622] It specifically requires evaluating "the risks of establishing liability and damages as to the claims, issues or defences of the class and individual class members and those of maintaining a class action [including class claims, issues or defences] through trial."[623] The

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[622] *Re Domestic Air Transportation Litigation*, 148 F.R.D. 279 at 313 (N.D. Dist. Ct.), cited in *Figueroa*, *supra* note 98 at 1323-24.

[623] *Grinnell*, *supra* note 12 at 463, cited in *Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d. 96 at 118-19 (2d Cir. 2005) ["*Wal-Mart*"]. See also Manual, *supra* note 12 at para. 21.62; Mulheron,

benefits and disadvantages of litigation are considered, including the need to obtain expert opinions on complex factual questions to evaluate the amount of damages.

When balancing the strength of the plaintiffs' case on the merits with the amount offered in the settlement, courts quantify "the net expected value of continued litigation to the class ... estimat[e] the range of possible outcomes and ascrib[e] a probability to each point on the range".[624] In fact, a settlement with a lesser value will not be considered adequate.[625] Although "[a] high degree of precision cannot be expected in valuing a litigation, [courts should nonetheless] insist that the parties present evidence that would enable […] possible outcomes to be estimated [to be able to come up with a] ballpark valuation."[626]

The issue of the class action's certification is sometimes complicated and the likelihood of recovery or success uncertain. In that case, a proposed class settlement—even if its offer is a modest one—is likely to be considered to afford more certainty than litigation. It is likely to be approved. For example, courts gave effect to a settlement that involved class members with complex personal medical histories in part because it would "[ensure] the privacy of their medical histories and [bring] an end to litigation that [likely] intensified the emotional devastation of

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supra note 38 (discussing cases where proposed settlements were approved because "even if the class won at trial, [the] judgment amount [would] not [be] significantly in excess of [the] settlement offer" at 402-03).

[624] *Reynolds, supra* note 237. See also *Re General Motors Corp. Engine Interchange Litigation.*, 594 F.2d 1106 at 1132 (7th Cir. 1979) (Balancing the merits of plaintiff's case against the amount offered in settlement "requires a comparison of the amount offered with the product of (1) the probability of plaintiff's prevailing on the merits times (2) the present value of probable damages plaintiff would recover if he did prevail").

[625] *Reynolds*, *ibid* at 284-85.

[626] *Ibid* at 285.

infertility."[627] Courts also approved a settlement where a change in the law had created a substantial risk that, absent the settlement, the defendants would move to de-certify the class.[628]

In sum, this first substantive fairness factor mandates that the courts rationally assess the class action's merits in light of the facts and law, and determine whether the compensation sought is fair, reasonable and adequate. Evaluating the strength of the case as against the settlement offer, however, remains challenging in a context where most cases settle. In those instances where certification and trial is unlikely, and where the alternative to class settlement is an individual or group settlement, comparing the settlement offer with the amount that plaintiffs would obtain in a non-class settlement is probably more adequate.[629]

Another challenge is the fact that class action claims will not yet have been tried or contested on the merits at the fairness hearing or certification stages. Hence, at this stage, discussions about the merits are purely hypothetical. Furthermore, since settling parties agree about the terms of the agreement, there are no true opponents and the information available about the settlement negotiations is usually minimal. The reviewing judge then feels the need to rely heavily on representations made by counsel and the parties. In this context, and as I have argued in Chapter II, while being careful not to properly examine the settlement on the merits, the judge must prefer an inquisitorial attitude *vis-à-vis* the proposed settlement.

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[627] *Bellaire, supra* note 158 at para. 34. Of course, the fact that this case was a personal injury class action arguably places it in a separate category of cases which deserve a higher degree of scrutiny from reviewing courts.

[628] *Wright v. Stern*, 553 F. Supp.2d 337 at 347 (N.Y. Dist. Ct. 2008) ["*Wright*"].

[629] See Menkel-Meadow, "Ethics", *supra* note 13 at 1210 ("we must consider what the realistic baselines of comparison are" when considering that the alternative to trial is settlement).

b) Future Expense, Complexity and Likely Duration of the Litigation

This second substantive fairness factor mandates that courts evaluate the future expense, complexity and duration of continued litigation if there is no settlement. In doing so, courts are likely to consider whether discovery and expert witnesses are needed, and whether future appeals are possible or probable. They are also likely to consider whether damages must be assessed individually, which would add additional costs and procedural delay. Courts will estimate how many years it would take to proceed to trial if the case does not settle, and whether there is a risk that parties would ultimately recover less at trial.[630]

Generally, "the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court."[631] Settlement will also be preferred where, for instance, the individual claims of the named plaintiffs and the claims of a substantial number of other class members would remain after trial of the class action, and where "the remedial phase would [be] complex and protracted."[632] By contrast, courts will reject proposed settlements in cases

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[630] *McBean*, *supra* note 593 at 385.

[631] *Ibid* at 385. Also see *Re Prudential*, *supra* note 12 at para. 18 ("Examining the sheer magnitude of the proposed settlement class as well as the complexity of the issues raised, we conclude the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court. The prospect of such a massive undertaking clearly counsels in favour of settlement"); *Wal-Mart, supra* note 623 at 118 (where a proposed settlement was favoured as against the eventuality of a three-month trial alleging complex antitrust law claims); *Marisol v. Giuliani,* 185 F.R.D. 152 at 162-63 (N.Y. Dist. Ct. 1999) (where a proposed class settlement was favoured as against the eventuality of a five-month trial involving more than one hundred ordinary witnesses and twelve experts).

[632] *Wright*, *supra* note 628 at 344. See also *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp.2d 830 at 843 (La. Dist. Ct. 2007) ("The public interest favouring settlement is especially

where, for example, only a small "additional investment of time and resources is necessary to prepare the case for trial."[633]

The usefulness and adequacy of this factor are debatable in a context where the great majority of class action cases are settled rather than tried, making it difficult for courts to evaluate what the potential litigation outcome of such cases would be and even more difficult to assess the future expense and likely duration of the litigation. Accordingly, in cases where trial is highly unlikely, courts should instead consider the future expense, complexity and likely duration of the alternative course of action—obtaining an individual settlement, for example. In addition, while spending less money is generally in the parties' best interests, if the case's substantive and procedural issues are so complex and important, perhaps it is fairer to spend more time, effort and expense on their determination. In the end, reviewing courts should remember that the fairness standard requires that settlement be a *better* solution than litigation in the circumstances, not an *easier* one.[634]

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apparent in the class action context where claims are complex and may involve a large number of parties, which otherwise could lead to years of protracted litigation and sky-rocketing expenses"); *Killough*, *supra* note 11 (where the settlement was approved in part because many class members were ill or dying and had immediate, urgent financial needs).

[633] *Figueroa*, *supra* note 98 at 1328.

[634] Indeed, they should never conclude, as did the Southern District of New York recently in *McBean*, *supra* note 593 at 386, that the future expense and complexity factor weighs in favour of settlement, because "[w]hile those processes [the summary judgment motions, pre-trial motions, additional discovery and additional delays] would not be terribly complex, they are much more complex than the simple and efficient settlement currently before the Court."

2. Extrinsic Factors of Substantive Fairness

a) Class Reaction: Number and Nature of Objections

When scrutinizing a proposed settlement, courts consider the reaction, if any, of the class members towards its terms and substance. They will ask whether these members have properly accepted the settlement – or given their "informed consent" to this settlement.[635] When class members formally object or voice concerns about the adequacy of the prospective settlement they become "objectors."[636] If objectors participate at the hearing[637], they will attempt to convince the court to reject the proposed settlement by arguing that the settlement is contrary to the class's best interests or that it was, for example, concluded following collusion between class counsel and defendants.

The existence of objections to settlement, and the number and nature of such objections, are fairness indicators generally considered by the courts and authors to be important, especially when evidence is presented in support of the objector's testimony. Indeed, American Federal courts have

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[635] See *supra* discussion about consent and informed consent, at text accompanying footnotes 271ff.

[636] See generally rules 23(e)(5) and 23(c)(2)(B)(iv) F.R.C.P. which provide the right to object to a proposed settlement and that class members may enter appearances through their attorney.

[637] Objectors are entitled to present their position through cross examination and argument to the court. See e.g. *Re Community Bank*, *supra* note 201 at 316; *Grimes*, *supra* note 201 at 1558 ("the objecting class members must be given an opportunity to address the court as to the reasons the proposed settlement is unfair or inadequate"). By contrast, in Canada objectors have no statutory right *per se* to participate in class proceedings, but they may be granted leave to participate in the approval hearing. See e.g. S. 14 Ont. C.P.A. They may also adduce evidence in support of their testimony if it is relevant to their arguments and if it is submitted in a timely fashion. See *Dabbs No. 1, supra* note 11 at para. 22.

regarded the small number of objections as a significant indicator of the fairness, reasonableness, and adequacy of a proposed settlement.[638] They have not, however, considered the absence of objections[639] to be a determinant consideration in denying a proposed class action settlement. Canadian courts, on the other hand, have considered the presenceof objectors —or lack thereof—as merely *one of the* factors relevant to the evaluatation of fairness at the judicial approval hearing.[640]

Interestingly, courts have considered the presence of objectors to be indicative of procedural fairness in cases where, for example, the objectors were not afforded "a full and fair opportunity to be heard".[641] At the hearing, the objectors are the only ones before the judge who are specifically *against* the settlement. Accordingly, their role is, arguably,

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[638] See e.g. *Figueroa*, *supra* note 98 at 1328 ("While a low percentage of objections points to the reasonableness of a proposed settlement, a high percentage of objections signals that a proposed settlement is not fair or reasonable"); *Wal-Mart*, *supra* note 623 at 118 (concluding that only 18 objections from a class of five million was "indicative of the adequacy of the settlement"). See also Leslie, "The Significance of Silence", *supra* note 525 at 72; Mike Absmeier "The Professional Objector and Revised Rule 23: Protecting Voice Rights While Limiting Objector Abuse" (2005) 24 Rev. Litig. 609 at 610-11; Edward Brunet, "Class Action Objectors: Extortionist Free Riders or Fairness Guarantors" (2003) U. Chicago Legal F. 403 at 405; Manual, *supra* note 12 at para. 21.62. In addition, the courts have considered express support or consent to settlement to be important: see *Grinnell*, *supra* note 12 at 463; *Re Milken*, *supra* note 587; *Killough*, *supra* note 11 at para. 27.

[639] See e.g. *Re Corrugated, supra* note 135 at 217-18; *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977) ["*Cotton*"]. But see *Re American Bank Note Holographics Inc.*, 127 F. Supp.2d 418 at 425 (N.Y. Dist. Ct. 2001) ("more than 5,000 notices were sent to potential members of the Classes or their nominees ... [and] not a single objection ... [had] been received. In addition, only five stockholders have sought exclusion from the proposed Settlement. The favourable reaction of the Classes is strong evidence that the Settlement is fair, reasonable, and adequate"); *Re Chicken Antitrust Litigation*, 560 F. Supp. 957 at 959 (N. Dak. Ga. Dist. Ct. 1980) ("Of special significance in this regard was the absence of any objections to the terms of these agreements, which would seem to indicate that the settlements were satisfactory to all those affected").

[640] See e.g. *Gariepy*, *supra* note 135 at para. 46 (where Justice Nordheimer matches the proposed terms of the settlement to the *Dabbs No. 1* factors, remarks that there are no objectors to the proposed settlement and concludes that the settlement is fair and reasonable).

[641] *Girsh*, *supra* note 582 at 157.

very important. Nevertheless, courts sometimes over-interpret or misinterpret the reaction of class members to a proposed class action settlement. The lack of significant opposition by class members may signify that they found the proposed settlement to be fair, and hence, that it presumably *is* fair. But it may also signify that class members failed to react to the proposed settlement because they were unaware of its existence or terms, of the class action litigation, or alternatively, that they did not have a sufficient opportunity to object because the "notices were too confusing, [they] had insufficient information, or […] were not given an adequate opportunity to voice their objections."[642] The existence of objections may be less meaningful if the objectors are motivated to oppose the settlement for the wrong reasons. For example, they may object to pressure the defendant to settle with each of them individually. In that case, their objection will be deemed irrelevant in the fairness analysis.

All in all, courts should use the class reaction factor sparingly and cautiously in conducting their inquiry into fairness. Regardless of the presence or absence of objectors to a proposed settlement, courts should pursue an independent analysis of the settlement terms. Objections should be encouraged, welcomed and seriously considered, to give everyone a chance to speak, for their own merit, and also as indicators of unfairness demanding greater scrutiny of the fairness and reasonableness of the settlement. The absence of objections should only be considered as indicative of fairness if, based on the evidence provided, it results from

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[642] Lahav, *supra* note 17 at 86.

"well-educated class members being satisfied, rather than ... objections being silenced."[643]

b) Recommendation and Experience of Counsel and Opinion of Interested Persons

In reviewing the fairness of proposed class settlements, courts take into consideration the opinion of interested persons, such as class counsel. Counsel's opinion is critical because in practice they, rather than class members, decide when and how to settle class action lawsuits. They are the proposed settlement's "maître d'oeuvre." Accordingly, their experience, qualifications and positive recommendations concerning the contents and terms of the settlement appear to be strong indicators of the fairness of process and substance of proposed settlements.

In practice, courts afford varying weight to counsel's recommendation. They will consider how long counsel have been working on the case at stake, and what their experience and specialization is in the particular type of litigation.[644] They will also consider counsel's reputation. In recent years, courts have tended to conclude that recommendations of counsel, following arm's-length settlement negotiations, are "entitled to great weight".[645]

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[643] *Ibid* at 88. See also *In re Gen. Motors*, *supra* note 98, para. 190 ("Even where there are no incentives or informational barriers to class opposition, the inference of approval drawn from silence may be unwarranted").

[644] See Lambert, *supra* note 148 at 114-15 (noting that one "salient factor [of the fairness inquiry] must be the input received by the attorneys involved in the litigation and settlement process").

[645] *Re Milken*, *supra* note 587 at 66 (noting however that "the court should not substitute its business judgment for that of the parties"); *Siegel v. Realty Equities Corp. of New York,* 1973 U.S. Dist. LEXIS 12499 (N.Y. Dist. Ct. 1973) at para. 8 (where the district court deferred to counsel's opinion, explaining that it was "in no position to substitute its judgment for that of honest and competent attorneys, who [...] have made a determination that the

Ultimately, it is hard to properly evaluate the weight to give the "recommendation and experience of counsel" factor. On the one hand, the experience and reputation of counsel are indicators of the quality—and perhaps honesty—of the arguments made in court regarding the proposed settlement. On the other, since it is the lawyers whom, in practice, drive the settlement forward and dictate the terms of the proposed settlement, they will necessarily and obviously believe it to be the best settlement possible for the parties. In their conflicted role of counsel for their client and counsel to the court, they will recommend that the proposed settlement be approved. Courts will have no real choice but to hear counsel's representations and recommendation and to place a lot of confidence in their reputation and oral arguments.

Nevertheless, the weight given to the opinion and recommendation of counsel should be guided by the court's role as guardian of the absent parties' interests.[646] Judges should always feel free to ask for clarifications, and properly question the representations made by counsel. The hidden objectives of this attitude are: (1) to send a clear message that proposed settlements are never approved blindly without questioning, and (2) to encourage counsel to place more effort into settlement negotiations and drafting, to make the proposed documents clearer and simpler. Courts should also occasionally consider the recommendation of other interested

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settlement represents a fair and realistic appraisal of their clients' chances of ultimate success"). *Vitapharm*, *supra note* 139 at paras. 141-42. See also *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 at 439-440, 22 C.P.C. 381 (Ct. J. (Gen. Div.)), aff'd 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372 ["*Dabbs No. 2*"] (where the recommendation of class counsel was held not to be dispositive, but recommendation of counsel of high repute was held to be a significant factor).

[646] *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473 at 478 (N.Y. Dist. Ct. 1970) ("If at all possible, this court would have chosen to acquiesce in said counsel's judgment concerning the merits of the proposed settlement. But the court is also mindful of its responsibility to act as guardian for those absent parties who are to be affected by this litigation as well as its responsibility to those objectants now before it").

persons or neutral parties, experts or court-appointed monitors, who would be appointed by the court and paid for by the parties. The opinion of the class representative(s) is also critically important.[647] Finally, courts should remember that each participant in the class action settlement has a personal motivation to settle which may differ from the motivation of other participants, and that dishonest participants or counsel could be recommending its approval for self-interested motivations.

b. Procedural Concerns about the Proposed Settlement: Factors Useful to the Procedural Fairness Inquiry

Procedural fairness involves scrutinizing the negotiation process and the interaction between the participants for any indication of improper behaviour or procedure. To be considered procedurally fair, the class settlement must result from "arm's-length negotiations by class counsel with experience and ability [and from] discovery, necessary to effective representation of the class's interests."[648] More specifically, the following factors are relevant to the inquiry into procedural fairness.

1. Adequacy of Representation, Good Faith and Absence of Collusion

Adequacy of representation, good faith and absence of collusion are fundamental factors considered in the procedural fairness determination. This inquiry focuses on the negotiations process which led to the proposed settlement, seeking to ensure that the negotiating parties, originally adverse in interest, reach a settlement that is free of fraud or

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[647] See *supra*, final hypotheses for reform of Chapter II regarding the class action representatives.

[648] *Weinberger*, *supra* note 478 at 74.

collusion and that is the product of arm's-length negotiations and compromise.[649] It also seeks to verify that class counsel behaved as "honest fiduciar[ies] [and] adequate representative[s]" for the class as a whole throughout the settlement negotiations.[650]

Courts use the following two factors to evaluate the presence of good faith and the absence of collusion:

> i. the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and
> ii. information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation.[651]

These considerations are useful in determining whether the parties bargained at equal or comparable strength, and whether the negotiations resulted in the highest settlement that could be obtained without going to trial, such as to fulfill class members' needs and interests. For example, a settlement achieved after two years of litigation, extensive settlement

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[649] *Figueroa*, *supra* note 98 at 1321 ("the Court must determine if the settlement 'was achieved through arms-length negotiations by counsel with the experience and ability to effectively represent the class's interests.' The inquiry must address whether the settlement is the result of fraud or collusion or was achieved in good faith following arms-length negotiations"). See also *Mars Steel, supra* note 597.

[650] *Mirfasihi, supra* note 304 at 748 ("district judges presiding over proposed class settlements are 'expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole' because 'class actions are rife with potential conflicts of interest between class counsel and class members'"). See also *Figueroa, ibid* at 1321 ("The Court has to ensure that the class members' interests were adequately represented by counsel unimpaired by a lack of experience or ability");

[651] *Parsons*, *supra* note 163 at para. 72.

negotiations and an intensive four-week settlement mediation was approved judicially because it was considered to have resulted from active negotiations conducted at arm's-length with no collusion.[652]

Adequate representation further requires that there be no conflict of interest among counsel, the representative parties and the other class members. It also requires that the plaintiff representatives "vigorously pursue the claims of the class throughout the course of litigation",[653] with the help of adequate, qualified and experienced counsel.

In theory, the specific context of the fairness hearing requires courts to inquire about adequacy of representation using a similar two-pronged approach, with a consideration of the adequacy of representation by the representatives on behalf of the class, and of the presence of conflicts, if any. When considering the issue of potential conflicts of interest between class counsel and the class, courts review the conduct of class counsel during settlement negotiations to verify that they properly acted as fiduciaries to the class.[654]

In practice, however, the adequacy of representation factor is difficult to evaluate. It requires that courts be reliably informed about counsel's role and implication in the settlement negotiations, their relationship with other participants and clients, their true motivations throughout the negotiations and their efforts to pursue their clients' claims. This information is generally not readily available, especially in the "non-adversarial" context of the fairness hearing, where judges are generally

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[652] *In re Delphi Corporation Securities Derivative & ERISA Litig*ation, 248 F.R.D. 483 at 501 (Mich. Dist. Ct. 2008).

[653] Puckett, *supra* note 34 at 1288, citing *Eisen*, *supra* note 57 at 562.

[654] Puckett, *ibid* at 1290, n. 100.

uncomfortable proactively requesting additional information about the settlement negotiations or questioning the evidence presented.

Furthermore, the adequacy factor appears to refer primarily to representation by counsel, as opposed to representation by the representative. This is truly unfortunate, as the role of the representative is similarly fundamental to the class action litigation context, and, as elaborated upon in Chapter II's hypotheses for reform, should be scrutinized at all stages of the action - including settlement.

a) Negotiation of Counsel Fees in Settlement and Amount of Fees

One of the principal obstacles to guaranteeing a fair class action settlement *process* is the financial interest of counsel who "may be improperly influenced to accept certain settlement terms, or to accept a settlement at all, thereby subordinat[ing] the interests of class members to [their] own economic self-interest."[655] Accordingly, the negotiation and inclusion of counsel fees as a critical component of the settlement agreement is considered to pose a risk that counsel will be "distracted from zealously guarding the best interests of the class, and particularly the class' absent members."[656] Furthermore, the provision of copious counsel fees in a class action settlement raises the potential for a conflict of interest as it creates a presumption that class counsel negotiated lower client compensation in

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[655] Coffee, "Class Action Accountability", *supra* note 218 at 371-72.

[656] Lambert, *supra* note 148 at 102. See also *Reid, supra* note 188 at para. 11; *In re Gen. Motors*, *supra* note 98 at para. 139 (noting that although the Supreme Court opinion in *Evans v. Jeff D.*, 475 U.S. 717 (1986) overruled a strict prohibition on simultaneous fee negotiation, the presence of such negotiation nonetheless "increases [the] concern about the adequacy of representation"). See generally Gregg H. Curry, "Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit" (2000) 24 J. Legal Prof. 397.

exchange for larger fees. The mere presence of fee amounts in the settlement agreement generally raises a negative public perception of fairness. By contrast, where counsel fees are negotiated separately and are reasonable, the settlement is perceived as objectively fair and proper.

b) Discovery Evidence Sufficient for "Effective Representation"

Courts scrutinizing proposed settlements must consider whether class counsel had "an adequate appreciation of the merits of the case before negotiating"[657] to make an informed judgment on behalf of the class members about the proposed settlement's reasonableness, as compared to the eventuality of trial.[658] In effect, class counsel must have conducted discovery necessary to "effective representation of the class' interests."[659] From the start of the negotiations, counsel must have possessed enough information and evidence about the case to bargain effectively with opposing counsel and to evaluate whether their client (i.e., the class) should agree to the proposed terms of settlement and to argue their client's case at the hearing.

Proposed settlements will be approved in instances where "the volume and substance of class counsel [and class members'] knowledge of the case

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[657] *Re Gen. Motors, supra* note 98 at para. 193; *Re Global Crossing*, *supra* note 584 at 458 ("Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims"). Informal discovery, nonetheless, is encouraged to notably expedite the negotiation process. See *In Re Sony*, *supra* note 593 at 7.

[658] See e.g. *McBean*, *supra* note 593 at 386, citing *Re Elan Securities Litigation*, 385 F. Supp.2d 363 at 370 (N.Y. Dist. Ct. 2005).

[659] See e.g. *D'Amato*, *supra* note 592 at 85; *Girsh*, *supra* note 582 at 157. But see *McBean*, *ibid* at 385 ("class counsel's decision to forgo additional discovery in the hopes of minimizing costs and achieving a quick recovery for their clients appears to be both fair and reasonable, and falls within the bounds of effective representation"). See also *Grinnell*, *supra* note 12 at 463.

is adequate to support [the] settlement."[660] For instance, an early settlement was approved in a case where "sufficient" discovery had been conducted to determine the class's damages and to learn about the case's merits, such that counsel and plaintiffs had an "adequate appreciation of the merits of the case [...] before negotiating."[661]

In practice, this factor is difficult to apply. It is incredibly subjective because the required amount of knowledge about the merits of a case is strictly determinable on a case-by-case basis. Courts grapple with questions such as: were this *specific* class and its counsel adequately aware of the merits of the case when they negotiated the settlement? *How much* knowledge is *enough* and *adequate* to support the settlement? How is this knowledge proven? How "mature"[662] must the claims really be? And, in the end, how useful is this factor given existing ethical requirements that class counsel possess a strong knowledge of the case before negotiating a settlement on behalf of their clients?

The use of this factor should be limited to discovery sufficient enough to afford the parties "a clear view of 'the facts and legal issues involved, as well as the strengths and weaknesses of [the parties'] positions.'"[663] Settling parties (including the representative) and counsel must understand their case's merits and the benefits of the proposed settlement to properly conclude it. Hence, courts should preferably approve

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[660] *Re Prudential*, *supra* note 12 at 319 (where discovery of more than 1 million documents, 160 computer diskettes, 500 audio and video tapes was found to be "adequate").

[661] *Re Cendant*, *supra* note 503 at para. 94 citing *Re G.M. Motors supra* note 98 at 813.

[662] *Re Electrical Carbon Products Antitrust Litigation*, 447 F. Supp.2d 389 (N.J. Dist. Ct. 2006) at 400 ("Where [the] negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent").

[663] *Manners v. American General Life Insurance Co.,* 1999 WL 33581944 at 21 (Tenn. Dist. Ct. 1999).

settlements that were concluded contemporaneously to a certification hearing—or alternatively, to preliminary motions which necessitated, at a minimum, some discovery of the facts. By contrast, if the proposed settlement was concluded before any discovery was conducted, and the settling parties appear insufficiently informed of the settlement's substantive provisions, as evidenced by their testimonies or cross-examinations at the hearing, courts should request further discovery before another fairness hearing is scheduled.

2. Adequacy of the Notice of Proposed Settlement to Absent Class Members

Before approving a proposed class settlement, courts must examine whether adequate notice of the proposed settlement was provided to potential class members.[664] As previously discussed in Chapter I[665], notices of settlement and of the fairness hearing are only required in Quebec and in the U.S. federal courts. In the other two target jurisdictions, Ontario and British Columbia, the notices are optional in theory, but their issuance has become the rule, in practice.

When notice is issued, courts measure its adequacy according to a standard of "reasonableness."[666] The notice must inform the potential members of the class about the nature of the class action litigation, the proposed settlement's general provisions and their options in the

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[664] See *Re Prudential, supra* note 12 at 306, 326-327 ("In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class" and on the "adequacy of class notice").

[665] See *supra* text accompanying footnotes 180ff.

[666] *Wal-Mart, supra* note 623 at 113.

proceedings.[667] It must also announce the time and date of the settlement fairness hearing, and give interested parties the opportunity to object to the proposed settlement.[668] Notice is adequate if it is understandable by the average class member.[669] For instance, a combination of individual and public notice to over eight million class members combined with unsolicited news coverage was found to be sufficient as it "greatly increased" the compensation potential of injured policyholders.[670]

The "adequacy of notice" factor should be a primary requirement of the procedural fairness inquiry such that no settlement should ever be approved without its careful review, in light of the proposed settlement's terms and substance. Requiring such a notice is *logical* and *necessary* in a context such as the class action, where hundreds—and sometimes thousands or millions—of class members are bound by the proposed settlement upon its approval.

On the other hand, notices should also be *effective* and *efficient*. Each time a settlement notice is sent out, money is paid to advertizing companies and/or the media, subtracted from the compensation moneys that would ultimately be paid to the class members. Accordingly, courts should be cautious of not "over-noticing", and of approving cost-efficient and

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[667] *Ibid* at 113-14. In Canada, the latest statement of the required standard for notice of settlement to non-residents in national or multijurisdictional class action settlements was given by the Supreme Court of Canada in *Lépine*, *supra* note 195. See also *Hocking v. Haziza*, [2008] R.J.Q 1189 at paras. 229ff. (C.A.). Also see *supra* text accompanying footnotes 180ff.

[668] See *supra* text accompanying footnotes 180ff. Also see *Re Rent-Way Securities Litigation*, 305 F. Supp.2d 491 (Pa. Dist. Ct. 2003).

[669] *Ibid*. See also *Lachance v. Harrington, supra* note 221 at 636 (the notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

[670] *Re Prudential*, *supra* note 12 at 327.

economical notices. They should remember that only a few lines of the notice will realistically be read, even by the more educated individuals. The notices should be short, simple, creative and effective in reaching the largest number of class members.

c. Golden Rules of the Fairness Inquiry

1. Required "Range of Reasonableness" of the Proposed Settlement

Class action settlements result from discussion and cooperation, compromise and concession, then… agreement. Participants to the settlement negotiations rarely obtain exactly what they wanted at the start of negotiations. Because class settlements involve settling parties with similar claims, whose representations are principally made by counsel and reviewed by judges in light of an indeterminate doctrinal framework, their fairness is subjective and imperfect.

Accordingly, a first golden rule that courts have followed at the fairness review stage, and should continue following with the proper safeguards suggested below, is to recognize that acceptable class settlements include a "range of possible resolutions."[671] This range acknowledges the "uncertainties of law and fact [and the] concomitant risks and costs necessarily inherent in [...] any litigation."[672]

Applying this first golden rule involves evaluating first what the acceptable "range of reasonableness" is for the proposed settlement,

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[671] *Dabbs No. 2*, *supra* note 645 at 439-40; *Châteauneuf v. Canada*, 2006 FC 286 at para. 7, 54; *Reid*, *supra* note 188 at para. 10; *Ontario New Home*, *supra* note 135 ("the settlement must fall within a zone or range of reasonableness" at para. 89); *Figueroa*, *supra* note 98 at 1326 (where the court evaluated the proposed settlement in its totality, and the "point on or below the range [of possible recovery] at which a settlement is fair, adequate and reasonable"); *Re Prudential*, *supra* note 12 at 322.

[672] *McBean*, *supra* note 593 at 388; *Wal-Mart*, *supra* note 623 at 119.

comparing the best acceptable settlement outcome to the worst. It also involves comparing the proposed settlement against that "range of reasonableness" to determine what a fair, adequate and reasonable settlement is. Applying this rule also requires accepting that even a less than perfect settlement providing a lower compensation may be in the best interests of the settlement's participants when compared to the alternative risks and costs of litigating the case to trial.[673] Indeed, settling the case will be a more reasonable alternative in cases where trying the case to success would likely take more time and energy, would cost a lot more money, and compensation to the class would ultimately end up being inferior to the compensation provided in the settlement.

In fact, at the fairness hearing, courts will have to test settlement fairness and reasonableness "in light of the best possible recovery [*and* in light of] the risks the parties would face if the case went to trial."[674] Similar court-approved settlements will be considered, to assess whether the settlement under review and its value fall within a "reasonable range" when compared to these other cases. When evaluating the reasonableness of the proposed settlement of a case seeking monetary damages, courts will "compare the amount of the proposed settlement with the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing."[675] In cases seeking more than monetary relief, the proposed settlement's non-monetary relief will be

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[673] *Dabbs No. 2*, *supra* note 645 at 439-40.

[674] *Re Prudential*, *supra* note 12 at 322.

[675] *Ibid*; *In re Gen. Motors, supra* note 98 at para. 152 ("This figure should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside" at 806). See also *McCoy v. Health Net, Inc.*, 569 F. Supp.2d 448 at 463 (N.J. Dist. Ct. 2008) ("The Court must consider 'whether the settlement represents a good value for a weak case or a poor value for a strong case").

considered, as will its role and importance within the complete settlement and compensation scheme provided to all class members.

The rule of "reasonableness" requires that judges be flexible when reviewing proposed class settlements. These judges cannot, however, change or rewrite settlements; they can only approve or deny them, or impose conditions upon them.[676] They cannot reject proposed settlements simply because they disagree with their terms and substance or would have drafted them differently. They can only reject projected settlements if found "inadequate or unfair or unreasonable."[677] If the proposed settlement's terms and substance are fair, reasonable and adequate, whether another negotiator would have accomplished a better or fairer settlement is irrelevant.[678]

The reality of judicial practice, however, is different. Most judges do become involved in suggesting amendments to the settlement's substance, as appears from the scholars' writings[679] and my interviews of judges.[680] In the end, courts reviewing proposed class action settlements must

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[676] *Vitapharm*, *supra* note 139 at para. 127 ("The function of a court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement."); *Hanlon,* supra note 118 ("The settlement must stand or fall in its entirety" at 1026). *Cf. Re Auction Houses Antitrust Litigation*, 2001 WL 170792 at 18 (N.Y. Dist. Ct. 2001) (where district could held that could condition approval of a proposed settlement on parties' agreement to change proposed agreement).

[677] *Gariepy*, *supra* note 135 at para. 44.

[678] *Re Corrugated*, *supra* note 135 at 212.

[679] Resnik, "Litigating and Settling", *supra* note 36 at 855.

[680] These results are found in Chapter IV *infra*.

balance the need for adequate compensation to all class members and the fundamental challenge of finding a resolution that satisfies participants with diverse interests and motivations. Applying a "range of reasonableness" rule and recognizing the potential for different acceptable resolutions helps achieve this balance, and ultimately, creates a fairer settlement review process.

On the other hand, courts must be wary of giving way to arbitrary, random or intuitive determinations at the fairness hearing, justified by a "range of reasonableness" standard. They must carefully scrutinize proposed settlements and must not, as other courts have, liken the just settlement outcome to "an arbitrary point between competing notions of reasonableness."[681] Meanwhile, courts should also question proposed settlements in ways that leave the parties and counsel wondering whether the settlement will ultimately be approved or not and what the ultimate outcome of the fairness hearing will be. There should be no automatic approvals of proposed settlements, and more settlements should generally be denied to support a stronger perception of procedural fairness by the public.

2. Consideration of the Underlying Objectives of the Class Action Statutes

Several Canadian courts have considered the proposed settlement's accordance with the underlying objectives of the class action statutes.[682] In one Ontario Superior Court of Justice case, the proposed class action settlement was approved because it met the underlying objectives of the

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[681] *Perez v. Asurion Corp.*, 501 F. Supp.2d 1360 at para. 75 (Fla. Dist. Ct. 2007).

[682] For a detailed review of these objectives, see especially *Dutton*, *supra* note 182. See *supra* text accompanying footnote 35.

Ontario *Class Proceedings Act*: order, fairness and "redress of mass wrongs which are linked by an element of commonality."[683] In another, a class settlement was denied because it made "a mockery of the public policy upon which Ontario's class proceeding legislation is based" and would be "counter-productive to [the] important policy objectives of [...] access to justice, judicial economy and behaviour modification."[684] More recently, a national class action settlement was approved by the same court because it was fair and reasonable and afforded significant judicial efficiency and economy while allowing access to justice through an efficient and cost effective distribution mechanism.[685]

Although the consideration of class action objectives has not yet been, to the author's knowledge, openly and officially recognized by American courts at the settlement approval stage, it must be recognized as a second golden rule of the class action settlement fairness inquiry. Courts should weigh the respect for the three major objectives of the class action and its statutes—access to justice, judicial economy and behavioural modification and deterrence—when reviewing the substance of proposed class action settlements and the process through which they were reached and concluded.

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[683] *Ontario New Home*, *supra* note 135 at paras. 72-73.

[684] *Epstein*, *supra* note 139 at paras. 69-71.

[685] *Vitapharm*, *supra* note 139 at para. 186 (the settlement was also found to "serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing"). See also *Zopf, supra* note 115 at para. 51 ("Although the class members and the other debenture purchasers who are participating in the settlement will not be made whole, they will have access to justice and a significant recovery."); *Northwest*, *supra* note 12 at para. 33 (where the class settlement was approved because it was fair, reasonable and in the best interests of class members, and because it met the "objectives of improved access to justice; deter[red] future wrongs and promote[d] judicial economy").

In sum, settlement is but one of the outcomes of the class action, and this outcome must, similar to traditional adjudication, fulfill the class action objectives. The second golden rule of the fairness inquiry recognizes that the primary purpose of class action procedure is to produce a pattern of judgments *and settlements* that enforces the substantive class action law's incentive and justice objectives. It also recognizes that producing quality settlements is as important as producing quality judgments in achieving the overall purpose of class actions and in achieving fairness of process and outcome.

III. INADEQUACY OF THE CURRENT JUDICIAL REVIEW PROCESS OF CLASS ACTION SETTLEMENTS

The "fair, reasonable and adequate" standard has been criticized by legal scholars as inadequate to assist courts in determining what a "fair" settlement is.[686] Several elements of the fairness review and hearing process are inadequate or ill-suited to guarantee fairness of process and outcome. The strong public policy and judicial preference for class settlements, the inconsistent uses and applications of the procedural and substantive inquiries into settlement fairness— which will each be addressed in the following three subsections— create a settlement review system based on guesswork, "gross approximations and rough justice"[687],

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[686] See *supra* text accompanying footnotes 470ff.

[687] This expression originates from *Grinnell*, *supra* note 12 at 468 and *Officers for Justice v. San Francisco (City and County of) Civil Service Commission*, 688 F.2d 615 at 625 (9th Cir.1982) ("Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice'"). I strongly disagree with this wording of the standard, as offered by the Second Circuit in *Grinnell*. Notably, members are not properly protected by such a weak review standard. "Rough

as opposed to a regulated process with guarantees of fairness. In this section, it is suggested that this system must be improved in accordance with the standard of fairness suggested in this chapter's last subsection.

a. Strong Public Policy and Judicial Preference for Class Action Settlements

The resolution of complex litigation through settlement is generally favoured by the courts, in both traditional non-class litigation and in class action litigation. Public policy supports this preference. Litigants' interests are advanced through settlement because they are saved the time, expense and mental anguish of a complex trial. The judicial system is also benefited because the burden on state and appellate courts is reduced and "substantial judicial resources can be conserved by avoiding formal litigation."[688]

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justice" and "approximations" are not sufficient to provide fairness of process and outcome in a class action settlement context.

[688] *In re Gen. Motors*, *supra* note 98 at para. 34.

For public policy favouring settlements in Canadian caselaw, see e.g. *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 at para. 17 (H.C.J.) ["*Sparling*"]. See also ***J**.M. v. W.B.*, [2004] O.J. No. 2312 (C.A.) at para. 65 ("there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlementof civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice [....] Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation"); *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2001), 281 A.R. 176, 200 D.L.R. (4th) 667 (C.A.) at para. 27 ("In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice"); *Vitapharm*, *supra* note 139 at para. 111.

For American caselaw, see *Cotton*, *supra* note 639 ("Particularly in class action suits, there is an overriding public interest in favour of settlement. It is common knowledge that class action suits have a well deserved reputation as being most complex" at 1331), cited in *Re Milken*, *supra* note 587 at 53; *Alliance to End Repression v. Chicago (City of)*, 91 F.R.D. 182, at 183 (Ill. Dist. Ct 1981) ("There is an overriding public interest in favour of settlement especially in class actions").

Class actions, in fact, lend themselves particularly well to settlement with their difficulties of proof and complexity of the substantive claims, with the uncertainties of outcome and with longer durations of the litigation. Accordingly, the "practical value of an expedited recovery" is an important factor to consider at the fairness hearing, as early settlement avoids the cost and delay involved in discovery and other pre-trial procedures.[689] At the same time, settling a class action provides certainty and finality to class members and benefits defendants by extending the advantages of *res judicata* to all class members.[690]

Setting aside the benefits of settlement to litigants and to the judicial system, which are wholly justified in non-class action litigation, is this policy truly legitimate and justified in class action litigation? Is it fair to rationalize its existence and necessity in part on the parties' consent to settlement, when class actions are driven mostly by class counsel, who appear before the courts, negotiate the settlement and make representations on behalf of a large group of class members often unaware of the class action and/or settlement's existence, who fail to understand

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[689] See e.g. *Dabbs No. 1*, *supra* note 11 at para. 24; *Sparling*, *ibid* at paras. 25-6 ("without the proposed settlement, the trial and ensuing appeals would unquestionably consume additional years in a case of this magnitude and complexity [...] By the time the final decision would be rendered, the financial markets would have been placed for a long period of time in a state of uncertainty which would impact adversely on the interests of all shareholders involved"). See also *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (Sup.Ct.J.) at para. 13 ("Lengthy litigation would not be in the interests of the plaintiffs with its inherent risk and delay [...] The court does not, and cannot, seek perfection in every aspect, nor can it insist that every person be treated equally").

[690] See e.g. *Plummer*, *supra* note 500 at 660; *Pfizer Inc. v. Lord*, 456 F.2d 532 at 543 (8th Cir. 1972) ("The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto"). See also *Southern Pacific Railroad Co. v. United States,* 168 U.S. 1, 18 S. Ct. 18, (1897) (finality is important "to secure the peace and repose of society by the settlement of matters capable of judicial determination" at 49); Moore's Federal Practice, *supra* note 329 at s.131.10[1][a] (arguing that finality is fundamental for "other judicial concerns, such as fairness to the parties, fostering respect for and reliance upon court judgments and reducing overcrowded court dockets")

the nature and contents of the agreement and/or settlement agreement, or feel unconcerned by it? Is the wide and frequent use of the policy appropriate and adequate in a context where class members' interests must absolutely be protected?

While settling cases promotes judicial economy and encourages litigants to "determine their respective rights between themselves,"[691] the peculiarity of the class action device makes the application of a public policy favouring settlements problematic if made without safeguards or restrictions.[692] The class action enables courts to hear the claims of many individuals—the class—through representations by class representatives and class attorneys. Unlike the traditional judicial model where the plaintiff client controls the conduct of the litigation, unnamed class members rely on others –namely their reprentative and counsel – to argue the case adequately and are bound by arguments they have not witnessed, cannot control, and may not fully understand.[693] Moreover, their interests may differ from those of their class representatives and counsel, who often primarily seek to recover as large an award as possible and may thus prefer to try the case.[694] Indeed, they may prefer to settle, as generally do the defendants in class action litigation.

The combined result of a widespread application of the public policy favouring settlement in a class action context, without proper safeguards, and of the (often considerable) weight given to counsel recommendations

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[691] *Feder v. Harrington*, 58 F.R.D. 171 at 174 (N.Y. Dist. Ct. 1972).

[692] See Lazos, *supra* note 5 at 308.

[693] See *ibid* at 311.

[694] For the varied interests of participants in a class action, see *ibid* at 312.

regarding the proposed settlement[695] and application of a "range of reasonableness" rule[696] has lead to the quasi-automatic judicial approval of class action settlements.[697] This combination arguably leads to increasingly shorter amounts of time being spent on the review of settlements, as compared to the amount of time that would be spent trying the case.[698] This has led settlement proponents to having gradually lighter burdens of proof of settlement fairness, and reviewing judges to intuitively feeling less involved in the review of settlement terms and substance, and assuming a decreased responsibility in achieving fairness of outcome.

Hence, the public policy and judicial favouring of class action settlements, as currently applied, is inadequate to fulfill the class action goals and to protect absent class members. Courts should be wary of blindfoldedly utilizing it to justify their predisposition towards or preference for settlements. They should refrain from using this policy in the class action context, and should minimize references to it, or any incidental reference to it should precisely detail how other arguments stand in favour of settlement approval, such that the public policy favouring settlements does not stand as a principal reason for approval.

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[695] See *supra* text accompanying footnote 644ff.

[696] See *supra* text accompanying footnote 671ff.

[697] This is further discussed in Chapter IV *infra*.

[698] Willging, *supra* note 244 at 141.

b. Inconsistent Uses and Applications of the Procedural and Substantive Fairness Lines of Inquiry at the Fairness Hearing

A thorough review of the North American fairness caselaw evidences inconsistent uses and applications of the two-pronged course of inquiry into fairness of process and of outcome by reviewing courts. This inconsistency is notable in a first category of cases in which courts have treated the procedural elements of the test as "absolute prerequisites" to settlement approval, denying settlements showing procedural unfairness.[699] A second category of courts has used the procedural line of inquiry to recognize a certain degree of fairness and legitimacy—i.e., a "strong initial presumption of fairness"—to proposed class settlements "(1) negotiated at arm's-length (2) by experienced counsel [presented for court approval (3) after meaningful discovery and] (4) where the number of objectors or their relative interest is small".[700] These courts have found the proposed settlement negotiation process to be presumably fair and reasonable when these conditions are present, but they have characterized the presumption as rebuttable.[701] A third category of courts has combined the procedural and substantive approaches into a single one, choosing to

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[699] Puckett, *supra* note 34 at 1284, citing *Leverso v. Southtrust Bank*, 18 F.3d 1527 at 1530 (11th Cir. 1994).

[700] For Canadian caselaw, see *Bellaire*, *supra* note 158 at paras. 27-28; *Vitapharm*, *supra* note 139 at para. 113. For American caselaw, see *Wal-Mart, supra* note 623 at 116; *Re PaineWebber Limited Partnerships Litigation*, 171 F.R.D. 104 at 125 (N.Y. Dist. Ct. 1997) ("So long as the integrity of the arm's length negotiation is preserved [...] a strong initial presumption of fairness attaches to the proposed settlement"), aff'd 117 F.3d 721 (2d Cir. 1997). A settlement arising from honest negotiations held under the judge's supervision will tend to reassure the court that the process was "free of collusion or undue pressure." See e.g. *McBean*, *supra* note 593 at 383.

[701] See *First State Orthopaedics v. Concentra, Inc.*, 534 F. Supp.2d 500 at 516 (Pa. Dist. Ct. 2007). Nevertheless, presuming the process to be fair has not stopped these courts from subsequently conducting a full-fledged review of its substance and terms using the factors developed in the caselaw.

overlook a procedural irregularity if it does not "adversely affect the settlement in a substantive way."[702]

These three different applications and uses of the procedural and substantive fairness lines of inquiry inject uncertainty into the process and outcome of class action settlement fairness reviews. They evidence competing conceptions of the balance between procedural fairness and substantive fairness. They also render the standard of settlement fairness more difficult to ascertain. Ultimately, courts should never presume the fairness of proposed class settlements without conducting a serious, thorough inquiry into the settlement fairness, even if this settlement was negotiated at arm's-length, by experienced counsel after discovery, and few objections are made.[703]

Ultimately, how is settlement fairness properly evaluated in a group or collective context? What approach must be preferred? I discuss these questions below, in the next subsection.

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[702] Puckett, *supra* note 34 at 1284-85 (characterizing this approach as the "proof is in the eating" or "no harm no foul" approach) citing *Re Corrugated*, *supra* note 135 at 207-08 ("the two subclasses had significantly diverging interests [such] that an attorney could not adequately represent all these interests throughout the litigation. This does not mean that the settlements are necessarily void, however, because even 'irregular settlement negotiations may […] form the basis for a judicially acceptable class action settlement […] if the record clearly indicates that representation of the class during negotiations was adequate and that the settlement itself is fair'"). Similarly in *Mars Steel*, *supra* note 597 at 684, Posner J. wrote, "Rather than attempt to prescribe the modalities of negotiation, the district judge permissibly focused on the end result of the negotiation .... The proof of the pudding was indeed in the eating."

[703] For a similar viewpoint, see Mullenix, "Taking Adequacy", *supra* note at 23 at 1693 (where the author argues in favour of "more robust, vigorous judicial scrutiny" and no presumptions of adequacy of representation.)

IV. IN SEARCH OF A CLEARER STANDARD OF SETTLEMENT FAIRNESS

a. Is Fairness Definable in a Class Action Settlement Context?

While the resolution of class action disputes by court adjudication is structured around strict legislative and judicial standards of procedural and substantive fairness, their resolution by settlement is subjected to court approval based on a rather vaguely defined standard of fairness. As such, North American class action settlement laws and judicial practices do not appear to ensure fair practices, or to safeguard the rights of the plaintiffs as adjudication does. Because the class action statutes do not define settlement fairness, courts have developed a series of qualitative requirements regarding the content and form of class action settlements. This, in itself, could bring certainty and fairness in the resolution of class proceedings by settlement. In practice, it does not because judges automatically rely on the lists of factors without further explicating the factors or the concept of settlement fairness, in a way that adds uncertainty to the evaluation of projected settlements.

In the face of the new reality of negotiated civil justice and increasingly popular resolution of disputes by settlement, a reformed approach to settlement fairness approvals becomes necessary. Of course, one major obstacle to reform is the lack of a proper, uniform definition of "settlement fairness" or "class action settlement fairness." But is such a definition possible?

My review of the Canadian class action caselaw has revealed that "(settlement) fairness" is sometimes considered by the courts as

synonymous to "(settlement) reasonableness".[704] Other times, the two concepts appear distinctly, but their distinguishing factors are not explained.[705] Occasionally, a class settlement will be considered "fair, reasonable and in the best interests of the class as a whole", but no reasons will be given to support this conclusion.[706] In fact, to my knowledge, no Canadian court has ever qualified a class settlement as fair but not reasonable, or *vice versa*.

Further assistance regarding the differentiation between fairness, reasonableness and adequacy is provided by the U.S. Federal Judicial Center in its *Manual for Complex Litigation Fourth*:

> Fairness calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims and the responsiveness of the settlement to those claims. Adequacy of the settlement involves a comparison of

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[704] See e.g. *Fakhri v. Alfalfa's Canada Inc.*, [2005] B.C.J. No. 1723 (S.C.) at para. 15 ("I am satisfied that the settlement falls within the range of reasonableness *or* fairness". [italics added]); *Haney*, *supra* note 18 at para. 44 ("I am satisfied that the settlement falls within a range of reasonableness *or* fairness". [italics added]).

[705] See e.g. *White*, *supra* note 12 at para. 18 ("I am satisfied that the settlement is fair and reasonable and in the best interests of the class as a whole."); *Fontaine*, *supra* note 188 at para. 40 ("the court should not reject a settlement unless it is inadequate, unfair or unreasonable"); *Option consommateurs*, *supra* note 579 at conclusions ("DÉCLARE que l'Entente et la Transaction (...) est juste et raisonnable et dans l'intérêt des membres."); *Sawatzky*, *supra* note 118 at para. 23 ("the proposed settlement agreement is fair and reasonable").

[706] See e.g. *Penton* v. *Parker Canada Holding Co.*, [2003] O.J. No. 2253 (Sup.Ct.J.).

> the relief granted relative to what class members might have obtained without using the class action process.[707]

The Federal Judicial Center's explanation is useful in theory, but in practice, the caselaw and doctrine reveal that judges rarely review or approve settlements based exactly on these three concepts.[708] Their conclusion is often much more intuitive. In fact, courts tend to naturally approve class action settlements after a nominal review of – and strong reliance upon – the applicable criteria and factors. Indeed, they rely on the lists of factors to support their evaluation of the fairness of proposed settlements.

Is fairness properly definable generally,[709] and specifically, in a class action settlement context? How can the individual justice ideals and objectives be related and adapted to the collective context?[710] Must these ideals properly be adapted to provide true "justice" in class proceedings?[711] Perhaps, as Menkel-Meadow suggests, "individual justice can still be achieved in mass [and general class action] cases by using

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[707] *Manual*, *supra* note 12 at para. 21.62, p. 315.

[708] A proposal that is consistent with the interviews of judges, further discussed in Chapter IV *infra*. Also see *supra* footnote 569 (on judging based on a "hunch").

[709] Richard A. Posner, "Rational Choice, Behavioural Economics, and the Law" (1998) 50 Stan. L. Rev. 1551 at 1561-62 (stating that "fairness' is the vaguest word in the English language"); see also Paul M. Barrett, "Influential Ideas: A Movement Called 'Law and Economics' Sways Legal Circles", *Wall St. J.*, Aug. 4, 1986, at 1, col. 1 ("Judge Richard A. Posner has little use for words like fairness and justice. 'Terms which have no content,' he calls them.").

[710] Menkel-Meadow, *supra* note 13 at 1161 and 1203ff. (where the author discusses avenues for "mass justice").

[711] *Ibid* at 1203.

different processes and procedures than those currently used in full trial adjudication"?[712]

In fact, the subjective nature of fairness appears enhanced in the class action context. It will generate difficult questions, such as: is *this* settlement fair and just to *all* class members—present or absent, named or unnamed? This subjectivity, however, should not impede jurists from attempting to better define settlement fairness, especially to support reform efforts of the class action litigation and settlement processes.[713] I believe that settlement fairness should be evaluated using an approach that conciliates the substantive and procedural fairness factors. One example of such an approach to settlement fairness at the approval hearing is the *Jeffery* case, which I discuss below.

1. **Model of Conciliation of Procedural and Substantive Fairness: the *Jeffery* Case**

The British Colombia Supreme Court proposes in *Jeffery*[714] a laudatory approach to settlement fairness at the review and approval stage. In that case, a proposed global class settlement was approved because it was found to be within an acceptable range and to appropriately reflect "the balance of the costs and benefits of continued litigation".[715] Interestingly, instead of re-stating each of the factors from the settlement fairness list, and blindly relying upon it, the court conciliates fairness of procedure and

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[712] *Ibid* at 1204.

[713] Newman, *supra* note 13 at 1646-47.

[714] *Jeffery*, *supra* note 255.

[715] This settlement was a multi-jurisdictional one and accordingly, was also approved in Ontario in *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 (Sup.Ct.J.), and in Quebec in *A.P.E.I.Q.*, *supra* note 521.

fairness of substance at the settlement approval stage, asking questions relevant to these two complementary aspects of fairness.[716]

The *Jeffery* court explains that the process of settlement negotiation and conclusion, and the supporting evidence must be considered first, in order to assess their "completeness and candour"[717]. The proposed settlement must be the product of "a reasonable negotiating process" that was not collusive or motivated by improper considerations.[718] The settlement's substance must then be evaluated. The courts must ask: "[d]oes the proposal reflect an appropriate balancing of the costs and benefits of settlement? (...) should the matter be settled on the proposed terms, or would the plaintiffs be better served by continuing the litigation [?]"[719] Finally, the courts must consider whether adequate notice of settlement was given to the class members, which they have, by and large, found to be appropriate. On this point, they must be "cautious" in approving the settlement if a large proportion of the class appears not to be satisfied with the settlement.[720]

In sum, the *Jeffery* Court lists four questions that a judge must ask before approving a proposed class action settlement:[721]

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[716] In fact, in *Pelletier*, *supra* note 11, the Quebec Superior Court also quickly considered fairness of procedure, by holding that evidentiary and procedural standards for settlement approval needed to be met before it could address the substantive law standards – e.g., that the settlement is "fair ("*juste*"), equitable ("*équitable*") and in the best interests of class members."

[717] *Jeffery*, *supra* note 255 at para. 22.

[718] *Ibid* at paras. 22-24.

[719] *Ibid* at para. 25.

[720] *Ibid* at para. 27.

[721] *Ibid* at para. 28.

1) Has counsel of *sufficient* experience and ability undertaken *sufficient* investigations to satisfy the court that the settlement is based on a *proper* analysis of the claim?

2) Is there *any* reason to believe that collusion or extraneous considerations have influenced negotiations such that an *inappropriate* settlement may have been reached?

3) On a cost/benefit analysis, are the plaintiffs *well-served* by accepting the settlement rather than proceeding with the litigation? And

4) Has *sufficient* information been provided to the members of the class represented by representative plaintiffs, and, if so, are they *generally favourably disposed* to the settlement?

[italics added]

This fairness test is composed of both substantive and procedural fairness standards. Substantive fairness, which helps test the objective fairness of the settlement, focusing on what the terms of the settlement provide, is principally involved at the third *Jeffery* factor. This factor seeks to evaluate what the settlement value is and whether it is fair. It resembles the "best interests of the class" standard in *Dabbs No. 1*, which asks whether class

members would have been better off going to trial than settling. Unfortunately, it omits the word "adequacy".

Procedural fairness, which helps analyze how the settlement was reached, by looking at how the settlement negotiation process was conducted, is involved in the first, second and fourth *Jeffery* factors. The first factor refers to the concept of adequacy of representation by counsel, while the second one is in part concerned with ethical issues in the context of representation by counsel. Finally, the fourth factor refers to information and consent issues, and to fairness of process in general.

So why is the *Jeffery* settlement fairness approach laudable? Because it is clear, simple and structured, and appears to give proper assurances of fairness. This appearance of fairness is fundamental to give confidence to the users of the civil justice system.[722] In addition, the approach is complete, in giving weight to both procedural and substantive fairness considerations.

Even so, the four-part doctrine includes many undefined and vague terms (which have been italicized within the above citation). For example, is an "inappropriate settlement" simply one that is not fit for approval in the larger sense, or does the word "inappropriate" refer to a standard of "appropriateness" that needs definition? Further, how are plaintiffs "*well*-served" [italics added] by the settlement rather than by litigation? Even if reference is made to the cost-benefit analysis, how much is *enough* (even in monetary terms)? How much information to class members is required to be "sufficient"? What does being "generally favourably disposed to

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[722] See e.g. E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (N.Y. & London: Plenum Press, 1988).

settlement" signify? How will a court evaluate whether class members are *generally* in favour of settlement in a class action context? These criticisms must be considered in light of the ever-subjective evaluation of fairness, which will be further discussed below, and the fact that perhaps, a certain amount of vagueness and subjectivity in the standard of fairness is unavoidable.

Nonetheless, the *Jeffery* approach is interesting and important because it leaves aside the repetitive litany of fairness lists, to prefer instead an approach which largely focuses on procedural and substantive issues, and asks questions with a two-parted approach and perspective to settlement fairness. Thus, the inquiry lies with the settlement judge, instead of deriving from mere repetition of the existing lists of fairness factors as support for the decision to approve or deny proposed settlements.

2. Settlement Fairness in the American Law Institute's Principles of the Law of Aggregate Litigation

On March 28, 2006, Discussion Draft Principles of the Law of Aggregate Litigation were presented to the *American Law Institute* membership. In these Principles was a chapter which dealt extensively with the settlement of aggregated cases, mostly in the class action context, discussing the major issues of existing judicial practice with regards to these settlements. The Principles primarily sought to improve the judicial oversight of these settlements, including the "generally perfunctory preliminary-approval stage of proposed class settlements."[723] A final version of the Principles

[723] Discussion Draft No. 1, *Principles of the Law of Aggregate Litigation*, The American Law Institute, April 21, 2006, at p. xxviii ["*Draft Principles*"].

was adopted at the 86th Annual Meeting of the *American Law Institute* on May 20, 2009.[724]

At first glance, the Principles are inspiring in their attempt to reflect recent, generally accepted changes in norms, practices and culture perceived in class action settlement approval processes, as they provide a list of clearly stated fairness criteria with supporting explanations.[725] On a closer analysis, one notices that whilst the substantive standard of settlement fairness – that the proposed settlement be fair, just and reasonable – remains unchanged, these Principles have truly helped improve the process by which the fairness of class action settlements is evaluated. In fact, the goal of the Principles' chapter on class action settlements is to "ensure that settlements are not unduly impeded while, at the same time, requiring protections that facilitate the underlying fairness to the class of any settlement reached."[726]

Section 3.02 of the Principles confirms the state of the law by providing that settlements of certified and proposed class actions must be approved by the courts. Precertification settlements, however, require "limited judicial oversight", given the "potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny,"

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[724] See online: American Law Institute <http://www.ali.org/index.cfm?fuseaction=meetings.annual_updates_09>. For this Paper's purposes, I will be working with the Final Draft of the Principles, which was adopted by the American Law Institute on April 1, 2009, *ALI Principles*, 2010, *supra* note 79.

[725] Reporters' notes to para. 3.01 state that the implementation of the principles will change the current law as explained in paras. 3.02-3.18. *ALI Principles*, 2010, *ibid*.

[726] *Ibid*, para. 3.01, Comment b.

but that "the very requirement of court approval may deter parties from entering into problematic precertification settlements."[727]

Section 3.03 of the Principles outlines the hearing and review procedure for class settlements, confirming once again the state of the law by requiring that courts follow a two-step process involving a preliminary review and final fairness review. Section 3.04 addresses the requirements relative to class settlement notices. Subsection 3.05 (a), finally, provides that settlement fairness will depend upon whether:

> (1) The class representatives and class counsel have been and currently are adequately representing the class;
>
> (2) The relief afforded to the class […] is fair and reasonable given the costs, risks, probability of success and delays of trial and appeal;
>
> (3) Class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and
>
> (4) The settlement was negotiated at arm's length and was not the product of collusion.[728]

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[727] *Ibid* at para. 3.02, Comment b.

[728] *Ibid* at para. 3.05 (a).

These factors already exist in the caselaw, but their merit is made clearer in the Principles and appended comments, illustrations and reporter's notes. What is interesting, among other things, is that it is assumed that counsel will approve the settlement, and accordingly, there is no formal consideration of counsel's opinion. The experience of class counsel is also considered to exist implicitly, as they would otherwise not be considered as adequate representatives according to Rule 23(a)(4) F.R.C.P. In addition, the presence and number of objectors is not considered probative (a position that recognizes the existence of ill-informed, professional, or troublemaking objectors), nor is the number of opt-outs (which suggests that the ALI's position is that a zero opt-out factor is not indicative of members actively agreeing to the settlement). Accordingly, only the most determinative and reliable factors of the existing North American caselaw fairness lists are preserved in the Principles.

Subsection 3.05 (b) of the Principles is also important because it renders Subsection 3.05 (a) applicable to "the class" and to "every substantial segment" of it, and evaluates fairness at these two levels instead of evaluating it strictly in relation to "the class as a whole," as provided in the currently applicable North American caselaw. It also opens up the possibility of concluding to the unfairness of settlement "for any other significant reason":

> (b) [t]he court may approve a settlement only if it finds, based on the criteria in subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in subsections (a)(1)-(a)(4) renders the

> settlement unfair. A settlement may also be found to be *unfair for any other significant reason* that may arise from the facts and circumstances of the particular case. [italics added][729]

The unqualified expression "unfair for any other significant reason" begs the following question: unfair with respect to what, and to whom? What sort of reason is not significant enough to already be listed in Subsection 3.05(a)? Is the *American Law Institute* hereby referring to the other existing factors listed in the North American caselaw – the *Dabbs* factors,[730] notably? While the answer remains unclear, the kinds of situations envisaged here are presumably highly specific ones where some element of the facts or circumstances of settlement appears fundamentally unfair. The red flag or "hot button" situations listed above[731] are certainly cases which could be deemed "unfair for any other significant reason."

Subsection (c) is also fundamental because it rightly sets aside all *presumptions* of settlement fairness. Does it also set aside mere *preferences* for settlement? Probably not, as this preference also exists in non-class litigation, and as the Principles explicitly note that "[l]itigation of claims that the parties wish to settle imposes needless costs on the judicial system and the parties."[732] The subsection, nonetheless, is useful in warning class

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[729] *Ibid* at para. 3.05 (b).

[730] *Dabbs No. 1, supra* note 11.

[731] See *supra* text accompanying footnote 169ff., for the list of "hot button indicators" and related discussion.

[732] See *ALI Principles*, 2010, *supra* note 79, Comment b. to Para. 3.01, at p. 189.

action parties once again that class action settlement review is a serious exercise which requires due consideration of all evidence available in light of the existing fairness criteria.

Finally, and importantly for this thesis's purposes, the Principles embrace the idea of a shared responsibility in ensuring the fairness of the proposed settlement, by all the class members' fiduciaries:

> […] the burden of proof rests with the proponents of the settlement. The purpose of the court's inquiry is to ensure that the interests of the absent class members are adequately protected so that they may fairly be bound by the outcome of the case. *As such, the responsibility for ensuring the fairness of the settlement rests with* [those having a fiduciary obligation to the absent class members:][733] *the class representatives, class counsel and the court*. [italics added][734]

This shared responsibility to ensure fairness is justified by the need for added protection to class members in the class action context. Encouraging class representatives and counsel to be more aware of their responsibilities of protection toward class members is a great improvement in regard to the existing state of the law. It also ensures the respect of fairness objectives by the settlement actors.

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[733] *ALI Principles*, Draft #2, *supra* note 377 at 227.

[734] *ALI Principles*, 2010, *supra* note 79, para. 3.05, Comment c.

3. Settlement Fairness in the Dutch WCAM

In 2005, the Collective Settlement of Mass Damages Act (WCAM)[735] was enacted, allowing for court-approved collective settlements to become binding on an entire class of injured parties, unless they opt-out.[736] Under this Act, an agreement is reached concerning the payment of a certain compensation, by and between allegedly liable parties and a foundation or association acting on behalf of a group of injured individuals:

> An agreement concerning the payment of compensation for damage caused by an event or similar events concluded between a foundation or association with full legal competence and one or more other parties who have committed themselves by this agreement to pay compensation for this damage may, at the joint request of the parties that concluded the agreement, be declared binding by the court on persons to whom the damage was caused so long as the foundation or association represents the interests of

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[735] See *supra* note 272 for complete reference of the Act.

[736] *Ibid*.

> these persons pursuant to the articles of association.[737]

Once the agreement is reached, the settling parties will jointly petition the Amsterdam Court of Appeals to declare the settlement binding on all injured persons.[738] Once these injured persons have been properly notified, by letter or newspaper announcement, the Court will hold a hearing at which occasion all interested parties will be allowed to present an oral argument.[739]

At this hearing, the Court will consider the procedural and substantive fairness of the proposed settlement. Precisely, Article 907(2) provides that certain minimum provisions must be included in the agreement, for the court to approve the request. Paragraph 3 of Article 907 lists the circumstances in which the court "shall" reject the request. The two paragraphs are reproduced below:

> 2. The agreement shall in any case include:
>
> a. a description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;

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[737] See extract of Art. 7:907, Para. 1, Dutch Civil Code, reproduced in [Note], "The Dutch 'Class Action (Financial Settlement Act)' ('WCAM')" (01-07-2010), online: http://www.rijksoverheid.nl/documenten-en-publicaties/circulaires/2008/06/24/the-dutch-class-action-financial-settlement-act-wcam.html, at 2.

[738] *Ibid*.

[739] *Ibid*.

b. the most accurate possible indication of the number of persons belonging to the group or groups;

c, the compensation that will be awarded to these persons;

d. the conditions these persons must meet to qualify for the compensation;

e. the procedure by which the compensation will be established and can be obtained;

f. the name and place of residence of the person to whom the written notification referred to in Article 908 (2) and (3) can be sent.

3. The court shall reject the request if:

a. the agreement does not comply with the provisions of paragraph 2;

b. the amount of the compensation awarded is not reasonable having regard, *inter alia*, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage;

c. insufficient security is provided for the payment of the claims of persons on

> whose behalf the agreement was concluded;
>
> d. the agreement does not provide for the independent determination of the compensation to be paid pursuant to the agreement;
>
> e. the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
>
> f. the foundation or association referred to in paragraph 1 is not sufficiently representative of the interests of persons on whose behalf the agreement was concluded;
>
> g. the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration that the agreement is binding;
>
> h. there is a legal entity which will provide the compensation pursuant to the agreement and it is not a party to the agreement.[740]

Interestingly, this fairness test is more directive than some of the other North American tests such as the American Federal Rule 23 test of fairness

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[740] *Ibid*.

and reasonableness. It mandates the Amsterdam Court of Appeal to automatically reject the proposed collective settlement if it sees any of the elements of the test are missing. It expressly leaves open the possibility of rejecting negotiated deals, which is also an interesting distinction from the existing North American laws and practices. Of course, the Court is similarly required to balance a list of procedural and substantive fairness factors with similar considerations to those included in the North American fairness tests. Nonetheless, what is made clearer by the Dutch legislation is the need to carefully explain who exactly is concerned by the deal, and the procedure that each of the members needs to follow to be able to claim compensation. Moreover, an interesting improvement to the North American law is the protection given to members through the security for compensation by the defendant(s), pursuant to Paragraph 3c.

b. Fairness in Non-Class Action Contexts

In the search for an improved, reformed standard of fairness, I find it useful in this subsection to broaden the analysis and discuss fairness in non-class action contexts. Accordingly, I herein discuss fairness in contract and litigation law, leaving aside fairness theory in criminal, administrative and tort law.[741] This discussion is useful to developing reform solutions applicable to the class action settlement review stage. Notably, it confirms the need to consider both procedural and substantive aspects to settlement, and both the settling parties' interests and those of the public's.

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[741] For a discussion of fairness in these latter three contexts, see: (1) fairness theory in tort law: Gregory C. Keating, "Reasonableness and Rationality in Negligence Theory" (1996) 48 Stan. L. Rev. 311; George P. Fletcher, "Fairness and Utility in Tort Theory", (1972) 85 Harv. L. Rev. 537; (2) fairness theory in criminal law (the theory of retributivism): David Dolinko, "Three Mistakes in Retributivism" (1992) 39 U.C.L.A. L. Rev. 1623; (3) fairness theory in administrative law: Julius H. Grey, "Can Fairness Be Effective?" (1981-2) 27 McGill L. J. 360.

1. Fairness in Contract Law

Class action settlements are, first and foremost, contracts to settle.[742] I believe that judges should be concerned with the fairness of proposed class action settlements at the time of their negotiation, approval and implementation. Is this proposal consistent with conceptions of fairness in fundamental contract law?

In contract law, fairness issues arise at different stages of the contractual relationship. They arise at the pre-contractual stage, where the parties attempt to negotiate a preliminary contract before entering the principal one, if and when the negotiations are broken down.[743] They also arise when a contract has been concluded in circumstances and/or on terms which might offend against fairness and/or good faith, where duress, misrepresentation or undue influence may invalidate the contract or one of its particular provisions.[744] Unconscionability may also relate to fairness such as to render certain contractual terms unenforceable.[745]

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[742] See *supra* footnote 272.

[743] See e.g. N. Cohen, "Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate" in Jack Beatson & Daniel Friedman eds, *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) 25.

[744] See Stephen A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 348 f. (where the author refers to unconscionability as "procedural unfairness"). For a statement of the principles of fairness and good faith in Quebec law, see also: P.-G. Jobin, "L'équité en droit des contrats", in Pierre-Claude Lafond, ed., *Mélanges Claude Masse: En quête de justice et d'équité* (Cowansville: Ed. Yvon Blais, 2003) 473 at 507 (where the author characterizes the concept of « équité » (fairness) as a "fundamental principle of Quebec law"); G. Leclerc, "La bonne foi dans l'exécution des contrats" (1992) 37 McGill L. Rev. 1070; F. Héleine, "Les tribunaux d'équité ou l'équité et sa mise en oeuvre" (1971) 2 R.G.D. 15; J.-M. Trigeaud, « L'ontologie de l'équité » (1989) 34 McGill L. Rev. 414. The fairness-oriented approach in contract law may be distinguished from the freedom of contract approach. On this distinction, see generally: P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979). The latter approach considers how "the contract's terms fulfill the parties' interests, and balances those interests with the protection given to the consumer's substantive and procedural interests." See Chris

Fairness issues may similarly arise if and where the law provides protections to the weaker party. One contracting – or settling – party may have rights against the other but may be prevented from pursuing them due to ignorance or lack of resources. This is specifically the case in the judicial approval of class settlements, where a mechanism is implemented to protect the interests of those members who are affected by the substantive rights and obligations provided in the settlement but may not know of the class action and/or settlement's existence.

Hence, in contract law, "procedural fairness" refers to fairness in the *process* leading to the formation of the contract, and focuses on the presence of fraud or duress.[746] By contrast, "substantive fairness" refers to fairness in the "distribution" of the contract's substantive rights and obligations, and fairness of the contract's provisions.[747] It is concerned with the *outcome* of the contracting process.[748] These two categories of fairness have equivalents in civil procedure law, as further discussed in the next subsection.

Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Aldershot, England: Ashgate Publishing Lted,, 2007) at 33.

[745] Smith, *ibid*.

[746] Willett, *supra note* 744 at 2. See also Stephen A. Smith, "In Defence of Substantive Fairness" (1996) 112 Law Quarterly Review 138 at 138 ["*Smith, In Defence*"]; P.S. Atiyah & Stephen A. Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed. (Oxford: Clarendon Press, 2006) at c. 12; Hugh Collins, "Fairness in Agreed Remedies", in Chris Willett, ed., *Aspects of Fairness in Contract* (London: Blackstone Press Ltd., 1996) 97 at 100f.

[747] *Ibid*.

[748] See Smith, "In Defence", *ibid* at 140.

2. Fairness in Procedural (and Class Action) Law

Citizens use and obey judicial institutions when their processes and outcomes *appear* fair.[749] Accordingly, they will litigate and accept settlement terms or trial outcomes in the same circumstances. The very legitimacy of trial courts as dispute resolution mechanisms is founded upon the principle of fairness.

Even if fairness is a fundamental principle in procedural law, scholarly writings on the topic are scarce. Those who do address the concept of fairness in that context principally relate it to "*ad hoc* reasoning" and "pragmatic intuition".[750] Certain scholars advocate the use of an "*ex ante*" approach, according to which a procedure is considered fair if all parties would have agreed to it had they been able to contract for it in advance of ("*ex ante*") their dispute.[751]

Others claim that fairness in civil procedure requires that each injured person have an individual right to sue to recover for his or her losses; e.g., the "day-in-court ideal".[752] This right is considered as a "natural right",[753]

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[749] See e.g. Lind & Tyler, *supra* note 722.

[750] Robert G. Bone, "Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness" (2003) 83 B.U.L. Rev. 485 at 488-489 ["Bone, Agreeing to Fair Process"].

[751] See e.g. Bruce L. Hay, "Procedural Justice – *Ex Ante vs. Ex Post*" (1997) 44 UCLA L. Rev. 1803 at 18030-4, 1843-47; Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (Cambridge: Harvard University Press, 2002) at 48-51, 437-439 (noting that unlike torts, contracts, and criminal law, there is no developed body of literature on procedural justice, and procedure scholars do not attempt to elaborate detailed theories of fairness and often "leave their ideas about fairness implicit"). Also see generally John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) and John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001).

[752] Kaplow & Shavell, *ibid* at 228. See also Robert G. Bone, "Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation" (1990) 70

and one that is, arguably, jeopardized in the process of class certification.[754]

Similar to the fairness-oriented approach in contract law, normative theories of procedural fairness fall into two categories: "process-based and outcome-based".[755] Process-based theories evaluate the fairness of procedure by the way it treats litigants within the litigation *process*, independently from its *outcome*. They argue that parties should have an opportunity to "tell their stories" and "be treated humanely".[756] By contrast, outcome-based theories evaluate the fairness of procedure by the quality – and fairness - of litigation outcomes. In the context of civil adjudication, the relevant outcome is the final judgment or out-of-

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B.U.L.Rev. 213; Yeazell, "From Medieval Group Litigation", *supra* note 4 at 8. American courts too have recognized that everyone is entitled to his own day in court: *Ortiz*, *supra* note 175 at 846; *Martin* v. *Wilks*, 490 U.S. 755 at 762 (1989).

[753] See Roger H. Transgrud, "Mass Trials in Mass Tort Cases: A Dissent", [1989] U. of Illinois L. Rev. 69 at 74.

[754] See e.g. Owen M. Fiss, "The Allure of Individualism" (1993) 78 Iowa L. Rev. 965 at 967 ["Fiss, Individualism"] (explaining that "every person is entitled to a day in court and that no one can have his rights determined by a court without having participated in the proceeding"); Robert G. Bone, "Rethinking the "Day in Court" Ideal and Nonparty Preclusion" (1992) 67 N.Y.U. L. Rev. 193 at 232-235; Fuller, "Forms", *supra* note 4 at 364 ("[w]hatever destroys the meaning of [individuals'] participation destroys the integrity of adjudication itself"). See also Steven T. O. Cottreau, "The Due Process Right to Opt Out of Class Actions" (1998) 73 N.Y.U. Law Rev. 480 at 510-521 (arguing that there should be broader opt-out rights such that each individual is given his or her right to her own day in court); Woolley, Adequacy, *supra* note 326 (arguing that "each class member should have an individual right to be heard and to participate in litigation" affecting his rights); Transgrud, *supra* note 738 (arguing that individual day in court should be given in the mass tort setting to guarantee fairness).

[755] Robert S. Summers, "Evaluating and Improving Legal Processes – A Plea for 'Process Values'" (1974) 60 Cornell L. Rev. 1 at 2-4.

[756] Stephen N. Subrin, "The Empirical Challenge to Procedure Based in Equity: How can Equity Procedure be Made More Equitable?" (Paper presented to the First International Conference on Equity, June 1990), in Stephen Goldstein, ed., *Equity and Contemporary Legal Developments* (Fund for Equity Studies, 1992) at 771.

settlement, and its quality generally depends on the proper application of the relevant law to the facts of the case.[757]

Interestingly, U.S. Circuit Judge Jon Newman has written an outstanding essay about the ideals of fairness and justice that judges should have. Justice Newman speaks of a desire to reach "fair" outcomes – that is, the "best approximation of the correct outcome", and to provide all parties with a "fair opportunity to achieve that outcome".[758] He explains:

> Fairness is the fundamental concept that guides our thinking about substantive and procedural law. Fairness provides the measure by which we gauge the virtues of familiar arrangements and the risks of innovation. We strive continually to reach the *fair outcome*, by which we usually mean our *best approximation of the correct outcome* – the one in which the facts have been correctly found and the law correctly applied. We strive to provide each side with a *fair opportunity to achieve that outcome*, by which we mean the chance to initiate and pursue any plausible claim or defence, the availability of elaborate means for producing and testing evidence, and the assurance of appellate review to enforce the rules of the present

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[757] Bone, "Agreeing to Fair Process", *supra* note 750 at 510.

[758] Newman, *supra* note 13 at 1646. See also Kaplow & Shavell, *supra* note 751 at 250.

> system. All of this we do in the name of fairness. [italics added][759]

Justice Newman advocates the existence of fair processes and just outcomes in civil litigation, a two-parted objective I wholly ascribe to and seek to achieve in my reform principles.

Fair procedure, finally, depends on the underlying justifications for the legal rules that provide the basis for a lawsuit. As professor Owen Fiss aptly remarks, "fairness is a pragmatic ideal. [We must] acknowledge that the fairness of procedures in part turns on the social ends that they serve."[760] Accordingly, the fairness of class action settlement procedure depends on the social ends that this procedure serves. The principal social end of the settlement approval process is the protection of vulnerable individuals from class action abuse and conflicts of interest. Accordingly, class action settlement procedure will be fair if and only if it fulfills these ends.

Interestingly, fairness underlies the Canadian statutory criteria for certification. The Supreme Court of Canada in the trilogy of *Western Canadian Shopping Centres Inc.* v. *Dutton*, *Rumley* v. *British Columbia* and *Hollick* v. *Toronto (City)*[761] has held that class action statutes must provide a procedure that will balance efficiency with fairness, in order to achieve the class action's three principal objectives: judicial economy, access to justice, and behaviour modification. Fairness of class action law generally will, accordingly, depend on the respect of these three class action objectives.

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[759] Newman, *ibid*.

[760] Fiss, "Individualism", *supra* note 426 at 979.

[761] *Dutton*, *supra* note 182; *Rumley* v. *British Columbia,* [2001] 2 S.C.R. 534; *Hollick v. Toronto (City of)*, 2001 3 S.C.R. 158.

Accordingly, the right to opt out (or opt-in) of class proceedings, for example, can be considered as a fundamental requirement of procedural fairness, unique to class proceedings, because it balances fairness with efficiency and is consistent with the three stated class action objectives.[762] Opt-in systems are economical and provide greater access to justice to more individuals. These individuals will be bound without having expressly consented to be included in the class action litigation. The system also encourages greater behaviour modification as it allows greater numbers of members to form part of the class, which makes the threat of litigation more menacing for the defendant(s).

3. Fairness in the Approval of Canadian Corporate Arrangements

In this larger section I have examined how fairness is evaluated and defined in other, non-class action contexts. Because class action settlements are contracts to settle, made on behalf of a group of individuals, I have examined the law of contractual obligations. I have also reviewed the concept of fairness in civil procedure. In this subsection, I delve into the corporate world, to draw other parallels to the context and regulation of class settlement approvals. This analysis interestingly unveils a shared policy – or "social end"[763], in distinct contexts, of protection of the vulnerable members of a group in the eventuality where an agreement affects their rights.

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[762] On this point, see e.g. *Cottreau*, *supra* note 754.

[763] See *supra* footnote 760.

i. The "Deal": Arrangement *versus* Class Action Settlement

Pursuant to Section 192 of the *Canadian Business Corporations Act ("CBCA")*[764], an "arrangement" is a corporate mechanism used to achieve major changes in a corporate structure "where it is not practicable" under the CBCA's legal provisions.[765] Such arrangements "may include, among other things, an amalgamation, a transfer of all or substantially all the property of a corporation, or a going-private or squeeze-out transaction".[766]

Because these transactions have the potential to seriously alter the rights of security holders, they must, similar to class action settlements, be court-approved to be made effective, according to a standard of fairness evaluated at the occasion of a fairness hearing. The principal objective of this approval is to "not only [...] give the majority the flexibility to accomplish complicated restructuring objectives, but also *to protect the minority from being unfairly prejudiced* during such an exercise". [italics added][767] Another objective is to achieve a "fair balance between conflicting interests", that is, those of the corporation and those of "the security holders whose rights are affected by the transaction".[768] The

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[764] *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44 ["C.B.C.A."].

[765] S. 192(3) C.B.C.A.

[766] C.C. McNicoll, *Mergers, Acquisitions, and other changes of corporate control* (Toronto: Irwin Law, 2007) at 72.

[767] *St Lawrence &Hudson Railway Co. (Re),* [1998] O.J. No. 3934 at para. 25 (Gen.Div.).

[768] *BCE Inc. v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 ["*BCE*"] ("Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes

reviewing judge must then be convinced, as in class action settlements, that the legal rights of security holders have been treated in a "fair and reasonable" manner.[769]

Thus, similar to class action settlement law, approvals of corporate arrangements must enforce the legal rights of a group of more vulnerable individuals, who have been given an opportunity to express their objections to the arrangement. These similarities between contexts, however, must be tempered by the much more rigorous structure and regulation of corporate arrangements, and easy identification and communication with shareholders concerned by an arrangement, contrary to the settlement context in which members remain absent and inactive until they opt out, object or claim compensation. Nevertheless, the teachings of Canadian corporate law are useful to better define the concept of settlement fairness – or fairness of the deal – and role of the settlement judge, and to more aptly reform the settlement approval process, as will be further explained below.

ii. Approval Process and Actors

Judicial approvals of plans of arrangement and of class action settlements involve similar processes and safeguards. Three stages are required to obtain preliminary court approval pursuant to Section 192 *CBCA*.[770] First, and similar to the notice of settlement fairness hearing, the corporation

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are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.")

[769] *Ibid* at para. 127.

[770] M. Martel and P. Martel, *La compagnie au Québec, vol. 1 Les aspects juridiques* (Montréal: Éditions Wilson & Lafleur, Marcel Ltée, 2010) at para. 19-266; Olivier Proulx, *Le Traitement des porteurs minoritaires de titres de sociétés par actions publiques dans un contexte transactionnel : ou en sommes-nous?* (L.L.M., Faculté des études supérieures de l'Université de Montréal Option droit des affaires, 2006) [unpublished].

will seek an interim order from the court giving instructions for the scheduling of a meeting of shareholders and the transmittal of information to security holders.[771] A notice of the interim application proceedings will simultaneously be sent to the Director of Corporations appointed under the *C.B.C.A.* (the "Director")[772] prior to this preliminary hearing.[773] A proxy circular will also be sent to the security holders explaining the details of the arrangement and announcing that a meeting will be held to vote on the approval of the arrangement.[774] This procedure is comparable to the notice of fairness hearing, which similarly informs of the date and place of the hearing, details of the proposed class settlement, and possibility to formally object to the agreement.

Second, a vote on a special resolution is taken for the approval of the arrangement during the shareholders' meeting.[775] Of course, there is no such requirement of formal assent to a proposed class action settlement. Class members will be bound by a class settlement unless they opt-out,

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[771] *Ibid*. The order will also include instructions regarding the vote that should be made by categories of security holders with common interests and the selection of security holders that should vote.

[772] The Director appointed under the *C.B.C.A.* is appointed by the Minister "to carry out the duties and exercise the powers of the Director under this Act", s. 260 *C.B.C.A.* The Director protects the public interest and preserves the integrity of the Act by ensuring that public resources are used appropriately. He has certain powers "including the power to dissolve any corporation that defaults for a period of one year in sending any fee, notice or document required by the CBCA". See e.g. online: http://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home.

[773] S. 192(5) C.B.C.A.

[774] See Martel & Martel, *supra* note 770 at para. 19-266, citing *Re Pacifica Papers Inc.*, [2001] B.C.J. No 1049 (S.C.) ["*Re Pacifica*"] at para. 36.

[775] The expression "special resolution" signifies a resolution passed by a majority of not less than two-thirds of the votes cast by the shareholders who voted in respect of that resolution or signed by all the shareholders entitled to vote on that resolution": S. 2(1) C.B.C.A. The court may then require that votes be held by categories of security holders with common interests.

and may only express an opinion about a proposed settlement by formally objecting at the hearing. Third, a final fairness hearing is held, similar to class action settlement approvals.[776] The opposing security holders whose legal rights have been arranged are then afforded an opportunity to argue against the fairness of the proposed plan of arrangement,[777] in a way similar to settlement objectors. A notice of final application proceedings to the Director will be sent prior to the final hearing, a hearing after which the court will choose to approve or deny the plan of arrangement.[778]

Once the plan is approved, the corporation then sends the articles of the arrangement, along with required documents, to the Director, who will deliver a certificate of arrangement.[779] When the arrangement becomes effective, security holders lose their right to an oppression remedy.[780] Depending on the plan, shareholders may still retain a right to dissent, which allows them to have their shares redeemed by the corporation and not participate in the arrangement.[781] Shareholders are then given the right to "opt out of the corporation and demand fair compensation for their share".[782] While the right to dissent may appear akin to a class action opt out mechanism, it remains very different. Dissent affords a right to be

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[776] Martel and Martel, *supra* note 770 at para. 19-266.

[777] *Ibid*.

[778] *Ibid*.

[779] Ss. 192(6) and 192 (7) CB.C.A.

[780] *Ibid*, s. 241.

[781] Martel & Martel, *supra* note 770 at para. 19-265.

[782] *Ibid* at para. 31-77.1, quoting *Ford Motors Company of Canada Ltd. v. Ontario Municipal Employees Retirement Board*, 2006 Can LII 15 (Ont. C.A.), at para. 129. The principal objective of this opt-out right is to ensure that dissenters are "treated fairly by assuring receipt of proportionate share of the en bloc fair market value of all shares." See *ibid* at para. 31-78.1, quoting *Grandison v. Nova Gold Resources Inc.*, 2007 BCSC 1780, at para. 157.

bought out, contrary to the opt out which does not compensate the excluded member but leaves open the possibility of taking suit against the defendant individually at a later stage.[783]

Four key actors are involved in making plans of arrangement effective: the corporation and its directors, the security holders, the Director and the approving judge (whose role will be discussed in subsection iii). The corporation is responsible for seeking and obtaining court approval of proposed plans of arrangement.[784] It must convince the judge of the fairness and necessity of the arrangement.[785] This context is comparable to the class action settlement context, where only a small group of lawyers – and the class representative, at least in theory – conclude an agreement on behalf of a group of concerned members.

The Director also plays an important role in the approval process as he must receive notices of applications for interim hearings and final hearings from the corporation, and is entitled to appear at these hearings to opine about the arrangement's fairness.[786] The objective of these notices is to "allow the Director to make a proper determination of compliance

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[783] And interestingly, the final judgment can be appealed *de plano.* See Martel & Martel, *ibid* at para. 19-273.2.

[784] S. 192(3) C.B.C.A.

[785] *BCE*, *supra* note 768 at para. 119.

[786] S. 192(5) C.B.C.A. The Director has established the *Policy of the Director concerning Arrangements under Section 192 of the CBCA* ["*Director's Policy*"]. This Policy contains important guidelines notably requiring that: 1) notices and required listed documents be sent to the Director at least five days prior the interim hearing and three days before the final hearing 2) a vote be held for every security holders whose rights are affected by the plan, even if only on the economic point of view, while respecting the majority of the minority rule, 3) proof be made of the fairness of the arrangement to the Director's satisfaction, including the opinion of independent financial advisors that the plan is fair and reasonable for shareholders in every categories, 4) shareholders be permitted to dissent in respect of proposed arrangements. See e.g. Director's Policy, online: http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html.

with statutory requirements and as to whether minimum standards of procedural fairness are being observed".[787]. It is also interesting to note here the similarity between these notices and the notice provided under the *Class Action Fairness Act*, discussed above.[788]

iii. Fairness Test and Court Approval of a Plan of Arrangement

Similar to the class action settlement context, plans of arrangement will be approved and made effective after review and conclusion that they are "fair and reasonable".[789] This standard of fairness requires that the arrangement have "a valid business purpose and [that] the objections of those whose legal rights are being arranged [are being] resolved in a fair and balanced way".[790] In the Supreme Court of Canada's words,

> [w]hether these requirements are met is determined by taking into account *a variety of relevant factors*, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and *the proportionality of the impact on affected groups*.[791] [italics added]

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[787] Director's policy, *ibid*, s. 3.03.

[788] See *supra* text accompanying footnotes 105 to 109.

[789] S. 192 C.B.C.A.

[790] *BCE*, *supra* note 768 at para. 143.

[791] *Ibid* at para. 154.

In fact, in seeking the approval of a proposed arrangement, the corporation must satisfy the court "(1) that the statutory procedures were met, (2) that the application was put forward in good faith, and, [most importantly,] (3) that the arrangement is fair and reasonable".[792] The standard interestingly introduces a good faith criterion, similar to the class action settlement context, but one question remains in both contexts: how is the fairness and reasonableness of the arrangement evaluable and evaluated by the courts?

Until the recent landmark Supreme Court of Canada decision in *BCE*, courts had evaluated the fairness of proposed plans of arrangement according to the business judgment test. That test asked "whether an intelligent and honest business person as a member of the class concerned and acting in his own interest, would reasonably approve of the plan".[793] In *BCE*, the Supreme Court set aside the business judgement test and instead used a two-pronged fairness test requiring the court to be satisfied that: "(a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way".[794] The Court, in its unanimous decision, used this two-parted test to grant approval of the transaction, confirming that the fair and reasonable test required for court approval of a plan of arrangement had been satisfied.

Interestingly, and similar to class action settlement law, the plan will be held to have a "valid business purpose" if the court is satisfied that "the burden imposed by the arrangement on security holders is justified by the

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[792] *Ibid* at para. 137 and see *Trizec Corp., Re* [1994] A.J. No. 577 at para.13 (Q.B.) ["*Trizec*"].

[793] *Trizec, ibid* at para. 31.

[794] *BCE, supra* note 768 at para. 138.

interests of the corporation".[795] This standard is strikingly similar to the need to evaluate settlement fairness "to the class as a whole". In the corporate context, fairness thus requires that there be a "necessity" for the "continued operations of the corporation".[796]

Interestingly, before approving a proposed arrangement transaction, courts examine whether the concerns, accommodations and protections given to the parties are well balanced, based on a series of factors, none of them conclusive on its own:[797]

> The judge must be satisfied that the arrangement strikes a *fair balance*, having regard to the ongoing interests of the corporation and the circumstances of the case. *Often this will involve complex balancing*, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

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[795] *Ibid* at para. 145.

[796] *Ibid* at para. 146 ("Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny (....) If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. *Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders*.") [italics added].

[797] *Ibid* at paras. 146-149.

> [T]he court must be careful not to cater to the special needs of one particular group but *must strive to be fair to all involved in the transaction depending on the circumstances that exist*. The *overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders*"[798]
>
> [italics added]

This concern with balancing the interests of the concerned security holders should be officially imported in North American class action settlement law, such that class settlement judges strive to evaluate fairness at two levels: first, the overall fairness of the settlement, procedurally, substantively and with regards to public policy objectives (keeping in mind the deterrence and behavioural modification objectives), and second, the fairness of settlement regarding individual class members' interests (and considering by anticipation what the interests and rights of absent class members may be).[799]

One important factor considered by the courts in the approvals of plans of arrangement and considerably distinct from the class action settlement context is "whether the majority of security holders has voted to approve

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[798] *Ibid* at para. 148.

[799] This should not require the impossible task of evaluating conformity individually for each class member. Instead, courts should ask whether the proposed settlement addresses the presumed individual needs and interests of each category or sub-class of class members.

the arrangement".[800] Although the result of the vote is not legally binding and a vote *per se* is not legally required,[801] a vote overwhelmingly in favour of the plan is considered as a strong indicator that the plan is "fair and reasonable".[802] A weak vote in favour of the plan may on the contrary raise doubts that it is fair and reasonable[803]. This indicator of fairness does not exist in class action settlement law, and in addition, is very different from the indicator of the existence and number of objectors to settlement, which is heavily criticized by legal scholars.

Several other criteria have been used by the courts to evaluate a proposed plan's fairness, some of which are very similar to the settlement fairness criteria. Each criterion has a different weight depending on the circumstances of the plan. In the non-exhaustive list, courts may balance

> the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement, the impact on the security holders rights, the repute of the directors and advisors who endorse the arrangement and the arrangement's terms, whether the plan has been approved by a special committee of independent directors, the presence of a fairness opinion from a reputable expert,

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[800] Martel & Martel, *supra* note 770 at para. 19-269.

[801] *Ibid*.

[802] *Ibid*.

[803] *Ibid*.

> the access of shareholders to dissent and appraisal remedies.[804]

Proportionality of the agreement on affected groups is a fundamental criterion of fairness that requires, in the corporate context, that majority and minority shareholders be treated proportionally and equally.[805] Indeed, plans of arrangement often contain a compromise on the part of several parties for the "greater good of the whole".[806] Proportionality is not officially considered in the class action settlement laws of our four target jurisdictions, except for Quebec's law pursuant to Art. 4.1 C.P.C., but it is becoming increasingly more fundamental in civil procedural law world-wide.[807] Accordingly, it should also be considered in the class action context as it would ensure that class members are treated, if not equally, proportionally. This extended concept of proportionality of proposed settlements would require that the courts evaluate the proportionality of costs generated to date and until completion of settlement administration, versus the amount of compensation provided to class members.

Interestingly, and similar to the current class action settlement laws, reviewing courts are required to determine whether the arrangement, "viewed substantively and objectively, [is] suitable for approval".[808] Similar to the class action settlement context, where courts have held that

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[804] *BCE*, *supra* note 768 para. 152 and Martel & Martel, *ibid* at para. 19-271.7.

[805] *St Lawrence, supra* note 767 at para. 37.

[806] *Trizec, supra* note 792 at para. 42.

[807] Catherine Piché, "La proportionnalité procédurale : une perspective comparative" (2009-2010) 40 R.D.U.S. 1.

[808] *BCE*, *supra* note 768 at para. 136.

the standard of fairness is "not perfection",[809] there is no "perfect" arrangement; the plan need not be the *most* fair but only "fair and reasonable under the circumstances"[810].

Furthermore, similar to the class action context where vulnerable, concerned members of a group are sought to be protected, judges reviewing corporate arrangements must protect the rights and interests of security holders, especially minority shareholders.[811] They must "criticize the scheme and ascertain whether it is in truth fair and reasonable."[812] In fact, serious effort must be given to the evaluation of fairness. The role of the judge is not "a mere rubber stamp or one that is simply administrative rather than judicial".[813] It is a role of formal "approval", as opposed to merely giving permission to the corporation to go forward with the proposed arrangement.[814] Moreover, in the two contexts, the judge must similarly review and approve the agreement, independent of whether he would have approved it personally. Thus, the arrangement judge is

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[809] *Dabbs No. 1*, *supra* note 11.

[810] *BCE, supra* note 445 and *Trizec, supra* note 469 at para. 32.

[811] *Canadian Pacific Ltd. (Re)*, [1990] O.J. No. 864 (ONHCJ) [*Canadian Pacific*] quoting *Bell Canada Inc. v. Canada Business Corporations Act (Director)* (1982), 69 C.P.R. (2d) 188 at 191 (Ont. Sup. Ct.).

[812] *Ibid, Canadian Pacific* quoting *Re Dairy Corporation of Canada Ltd.,* [1934] O.R. 436 at 439 (Sup.Ct.). Their role replaces the need for greater safeguards in the corporate law statutes: "[...] the court's approval [...] is to be granted only when an arrangement is shown to be fair and reasonable to the shareholders. The court's supervisory role serves to overcome the necessity of any greater statutory protection for arrangements": *Re Pacifica*, *supra* note 774 at para. 60.

[813] Martel & Martel, *supra* note 770 quoting *Bell Canada Inc. c. Director, supra* note 811 at 191.

[814] *Canadian Pacific*, *supra* note 811.

required to refrain from getting involved in "internal management" decisions.[815]

Reviewing judges nonetheless maintain a large amount of discretion in the approval of arrangements under Section 192 C.B.C.A. Subsection 192 (4) of the Act lists the powers given to the judge, in a non exhaustive manner:

> (4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;
>
> (b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;
>
> (c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;

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[815] *Ibid* quoting Lord Davey in *Burland v. Earle*, [1902] A.C. 83 at 95, [1900-3] All E.R. Rep. Ext. 1452 (P.C.), ("These are questions for the shareholders to decide subject to any restrictions or directions contained in the articles of association or by-laws of the company.").

> (d) an order permitting a shareholder to dissent under section 190; and
>
> (e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

Accordingly, judges asked to evaluate plans of arrangements are required to be much more proactive than settlement judges. Before approving a plan, they are required to issue interim orders to ensure that every holder has received the proper information about the arrangement and that the minority shareholders are given the opportunity to vote on the arrangement by categories, they solicit and appreciate the opinions of independent fairness experts and of the Director, and they verify that the guidelines of the Director are respected and that all objectors have been heard.

iv. Conclusion

In conclusion, several aspects of the Canadian corporate law of arrangements can and should be imported into North American class action settlement law. I hereby list three principal ones:

First, and more generally, the rights of class members in a settlement context should be better ascertained and protected in a way similar to those of security holders in Canadian corporate law. Indeed, security holders are better protected principally because their interests are well known and defined. There should be an additional effort made by class representatives and class counsel to ascertain the interests of absent class action members at the class settlement negotiations stage, as further

discussed above in Chapter II. Of course, communication may not always be possible, but it should be encouraged, and the role of the class representative should be underscored as critically important to a better protection of class members' rights.

Second, settlement fairness should be evaluated in a way similar to evaluation of proposed plans of arrangement. Fairness should similarly be evaluated at three distinct levels. First, fairness should be evaluated as it relates to the class as a whole, procedurally and substantively, and second, as it relates to the public – considering deterrence and behavioural modification objectives. Third, fairness of settlement should be evaluated according to individual class members' interests organised in subclasses. Proportionality should also be verified, in view of ensuring that the costs of settlement are not disproportionate to the ultimate compensation to class members.

Third, class action settlement fairness would be better assured by directing the settling parties to inform public or government officials of the conclusion of settlement, similar to the notice provisions in the CAFA, discussed above, and to the notice to the Director in case of a plan of arrangement.[816] Giving notice to government officials gives seriousness and legitimacy to the settlement process, and leaves open the possibility that these officials might participate in the evaluation of fairness in such a way as to support the judge's decision to approve the proposed settlement.

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[816] See *supra* footnote 788.

c. Settlement Fairness Theories

North American law scholars have suggested a variety of fairness theories to help clarify the concept of settlement fairness. These suggestions have principally concerned the process by which it is evaluated.[817]

Certain scholars have suggested that to guarantee fairness of settlement, representation of absent class members must be improved, notably by assigning different lawyers to represent subclasses with conflicting interests,[818] or relying less on adequate representation by class counsel, and instead "empowering class members to protect themselves".[819] Others have proposed that a right of opt-out be afforded at the settlement stage,[820] that collateral challenges to the proposed settlement be permitted,[821] or instead that the substantive standards of fairness

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[817] For a few of the many law review articles discussing class action settlements: Leslie, "The Significance of Silence", *supra* note 525; David A. Dana, "Adequacy of Representation after Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements" (2006) 55 Emory L. J. 279; Lahav, *supra* note 17; Lambert, *supra* note 148; B.L. Hay and D. Rosenberg, "Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy" (2000) 75 Notre Dame L. Rev. 1377; Richard A. Nagareda, "Turning from Tort to Administration" (1996) 94 Mich. L. Rev. 899; Lazos, *supra* note 5. Of course, I have had to leave aside these articles to propose my own reform principles. I am nonetheless conscious that these periodicals may contain other reform proposals that are not discussed here.

[818] Coffee, "Class Wars", *supra* note 6 at 1445 (in favour of "subclasses with separate representation for present and future claimants.")

[819] Molot, *supra* note 30 at 54, citing Coffee, "Class Action Accountability", *supra* note 218 at 406-11. For a more targeted discussion of the forms of power generated through the class action, see Catherine Piché, "The Power of Class Actions" (2009) 2: 1 Critical Issues in Justice and Politics *77.*

[820] Coffee, "Class Action Accountability", *supra* note 218 at 420 (arguing in favour of additional delayed opt-out rights exercisable at the settlement's approval).

[821] See notably, Issacharoff & Nagareda, *supra* note 218.

applicable at the approval stage be scrutinized more closely.[822] Finally, others have relied on judges to obtain fair outcomes and processes in class action settlements.[823]

In a very recent law review article about class action settlements, Jonathan R. Macey and Geoffrey P. Miller provide suggestions for reform of the law regulating class action settlement approvals, and suggest a different approach altogether to judicial review of such settlements.[824] Essentially, they argue that what courts need are instructions regarding the appropriate level of scrutiny, such as to conserve judicial resources, emphasize all features of the settlement, and highlight the scope of trial discretion at the settlement review stage. Macey and Miller consider, in their suggested tiered scrutiny, the costs of approving bad settlements, the costs of rejecting good ones, and the costs of the review procedure itself.[825] They note that one relevant consideration is whether the court or class counsel's judgment is found to be more reliable. On this point, given the risk of conflict and collusion, I believe that the court's judgment is more

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[822] Menkel-Meadow, "Ethics", *supra* note 13 at 1162 and 1183 (where the author indicates that she believes that both process and substance questions are implicated, and […] that we must have either very strong process protections or a deeper scrutiny of substantive outcomes in our settlement processes."). Her approach resembles mine, except that I believe that fairness depends on *both* strong process protections and deeply scrutinized substantive fairness of the proposed settlement.

[823] Lahav, *supra* note 17 at 110ff.

[824] Jonathan R. Macey & Geoffrey P. Miller, "Judicial Review of Class Action Settlements" (2009) 1:1 J. of Leg. Analysis 167. Carrie Menkel-Meadow and William Schwarzer have also made important suggestions for reform that apply more specifically to the mass tort context: Menkel-Meadow, "Ethics", *supra* note 13 and William Schwarzer, "Settlement of Mass Tort Class Actions: Order out of Chaos" (1995) 80 Cornell L. Rev. 837.

[825] Macey & Miller, *ibid* at 177.

reliable. This will mean, as Macey and Miller suggest, that "stringent" or "*de novo*" review of the class action settlement must be preferred.[826]

The principal argument behind Macey and Miller's article is that different levels of scrutiny must be applied as different elements of the proposed settlement agreement are being considered. They believe that courts should apply lenient scrutiny on questions going to the settlement's adequacy, in a way that only simple justifications are given to a proposed settlement's terms, in the absence of fraud, collusion or conflict of interest.[827] They also suggest that intermediate scrutiny be given to settlement terms that raise fairness issues, such as allocation, coupons, shotgun provisions, reverse auction provisions, etc.[828] Finally, they advocate the highest level of scrutiny possible in the evaluation of counsel fees.[829]

For other scholars, settlement fairness requires more targeted reforms. For professors Bassett and Mullenix, settlement fairness calls for a more stringent review of adequacy of representation at the certification *and* settlement stages.[830] For professor Bronsteen, among others,[831] class action

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[826] *Ibid* at 178.

[827] *Ibid* at 178f.

[828] *Ibid* at 187f.

[829] *Ibid* at 196f. Also see Geoffrey P. Miller, "Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard" (2003) U. Chi. Leg. Forum 581; Dana, *supra* note 817.

[830] Debra Lyn Bassett, "When Reform is Not Enough: Assuring More Than Merely 'Adequate' Representation in Class Actions" (2004) 38 Ga. L. Rev. 927; Mullenix, "Taking Adequacy", *supra* note 23. Also see e.g. on representation: Nagareda, "Administering", *supra* note 465; Miller, "Competing Bids", *supra* note 472; Nancy Morawetz, "Bargaining, Class Representation and Fairness" (1993) 54 Ohio St. L.J. 1. Also see Ricciuti, *supra* note 16 at 851ff., who suggests a complex system through which a consultative unit, formed of

statutes should be amended to provide for opt-in class actions and their settlement.[832] These scholars in favour of opt-in systems argue that if small claims class members needed to officially opt into class actions, they could become monitors of class counsel and work together with them to demand the greatest compensation possible.[833] They also argue that while opt-in settlements would possibly discourage the parties from settling class actions, the proposed system would tend to discourage frivolous class proceedings from being filed.[834]

Other scholars, yet again, would like to see less money go to the lawyers and more to the members, and are primarily concerned with the consequences of entrepreneurial lawyering. To palliate this, they suggest having external monitors or guardians *ad litem* to supervise class counsel, "set their fee, and oversee their conduct in litigation and settlement" in exchange for a small percentage of the class recovery.[835] They argue that this guardian mechanism would bring in a "friend of the court – a fact finder who aids the judge in ensuring that the settlement serves the

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actual class members, is established to permit class counsel to seek input in settlement proceedings from a group of members actually reflecting the composition of the class.

[831] Edward H. Cooper, "The (Cloudy) Future of Class Actions" (1998) 40 Ariz. L. Rev. 923 at 935; Green, *supra* note 256 at 941.

[832] See e.g. Bronsteen, *supra* note 83 at 903;

[833] *Ibid*. Also see David Rosenberg, "Adding a Second Opt-Out to Rule 23(b)(3) Transactions: Cost Without Benefit" (2003) U. Chi. L.F. 19. Indeed, the authors of the Rand Report have argued that "clientless consumer class action litigation holds within itself the seeds for questionable practices": Rand Report, *supra* note 15, at 119.

[834] Bronsteen, *supra* note 83 at 907.

[835] See Lazos, *supra* note 5 at 325ff.; Klement, *supra* note 475 at 28-29. Also: Koniak, *supra* note 70 (arguing that guardians *ad litem* can protect the interests of absent class members against collusive behaviour by class counsel); Green, *supra* note 256 at 1796ff. ("The appointment of a guardian *ad litem* … is an effective mechanism to protect absent class members' interests.").

interests of the absentee class".[836] Obviously, this mechanism would have the principal advantage of informing the settlement judge about the proposed settlement and breaking the judge's isolation in the approval process, but it would also increase costs tremendously. In addition, it would "fundamentally alter the negotiation dynamics involved in settlement, and would not solve the problems of settlement, but would underscore the "pervasiveness" of these problems.[837]

Finally, Professor William B. Rubenstein argues in favour of reform of class action settlement practices through "a combination of adversarial and regulatory approaches."[838] He suggests four mechanisms to improve the accuracy of review at fairness hearings: a) the "devil's advocate" (who would assist the courts in questioning the proposed settlement);[839] b) bonds (to pay attorney fees of objectors to the settlement)[840]; c) labels (requested by a public agency in order to make the proposed settlement more transparent and ultimately, improve its overall quality); and d)

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[836] Lazos, *ibid* at 327. The YMB Magnex Settlement, discussed in the introduction, was one example of a case in which a friend of the court was appointed.

[837] Ricciuti, *supra* note 16 at 848.

[838] Rubenstein, "Fairness Hearing", *supra* note 528 at 1439. He explains at 1339-40 that "[f]or review of the substance and value of the class's legal claims, adversarial presentation of issues is the preferred procedure and a judge the favoured decisionmaker. For review of the settlement process, regulatory oversight is required and an administrative inquisitor the ideal agent. Thus the proposed settlement of a class action should trigger a two-part fairness hearing, involving both judicial assessment of the value of the claims and regulatory assessment of the process of settlement."

[839] Rubenstein explains that the concept "has been in the scholarly literature for a while", *ibid*, citing Lahav, *supra* note 17 at 128 and Lazos, *supra* note 5 at 322.

[840] Rubenstein cites others who have similarly suggested bonds : Rhonda Wasserman, "Dueling Class Actions" (2000) 80 B.U. L. Rev. 461 at 529; Miller, "Competing Bids", *supra* note 472 at 639-40. He also explains that Alon Klement has "propose[d] auctioning off the right to provide a monitoring function throughout the lawsuit in return for a percentage of the fund." See Klement, *supra* note 475.

certification marks (issued by an independent private group to evaluate and inform about the settlement's adequacy).[841] His creative proposals have the quality of being original, but may be criticized as involving additional costs and as being exclusive of the court's role and involvement. Although my reform hypotheses would also require additional costs, they focus instead on developing the fairness standard and the role of the settlement judge and other principal actors, without a required involvement of third parties.

In the end, scholars have principally suggested reform principles relating to the settlement fairness approval process, as opposed to specifically addressing the concept of settlement fairness. Carrie Menkel-Meadow, whom I most agree with, interestingly suggests a reform of the ethical rules and practices applicable to class action settlements.[842] She relates the concepts of fairness of process and outcome to class action settlement process and asks whether fairness can really be achievable in this context.

The reform I propose is more complete as it includes hypotheses for reform that are later tested for plausibility against the opinions of judges in my target jurisdictions. It also builds on the existing relationships between the settling actors, considers ethics as a fundamental dimension of fairness in settlement approvals. Finally, my reform's strength is its specificity to the following three components of class action settlement approvals: (1) the approval process, (2) the fairness standard, and (3) the role of the settling actors and settlement judge. I believe that settlement fairness depends on fair processes of review and approval, and reformed roles for the settling actors and settlement judge. The following subsection

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[841] Rubenstein, *ibid*.

[842] Menkel-Meadow, "Ethics", *supra* note 13.

explains how the standard of settlement fairness should precisely be reformed.

V. REFORMING THE STANDARD OF SETTLEMENT FAIRNESS

In the previous two chapters, I suggested a series of reform principles relating to the roles of the principal settlement actors and to the settlement processes. In this chapter, I discussed the concept of settlement fairness, both in a class action context and in non-class action but similar contexts. I herein conclude with a hypothesis for a standard of settlement fairness which the class proceedings laws of the four target jurisdictions should require.

This hypothesised settlement fairness standard seeks to:

- Inform judges, counsel and parties about the definition and significance of settlement fairness and its applications;

- Promote transparency in the judicial practices;[843]

- Clarify and simplify the fairness standard and relevant fairness criteria, such as to provide greater consistency, certainty and predictability in the process and outcome of class settlements; and

- Respect the class action law objectives.

Accordingly, and given these broadly stated objectives, the standard of settlement fairness I propose also conforms with three of the class settlement governance principles enunciated in this thesis' introduction: adequacy of representation, complete disclosure and transparency, and

[843] Other scholars have similarly argued in favour of disclosure and transparency. See notably, Rubenstein, "Fairness Hearing", *supra* note 528 at 1439 and Lahav, *supra* note 17 at 118.

the utmost respect for class action law objectives. Furthermore, it is equally applicable to both Canadian and American class action settlements and to all types of class actions regardless of their underlying substantive law claims. It does, however, recognize that certain types of class action cases—such as small-claims, personal injury or civil rights cases—may require that a greater, and coincidently more specific concern be shown by counsel and the representative to class members' interests, and that settlement fairness may then be scrutinized by the judge more closely.

Instead of relying on standardized lists of settlement fairness factors, the standard balances and conciliates procedural and substantive fairness, and is supported by fairness factors that may or may not be found relevant to the two mandatory categories, depending on the judge's discretion. It also evaluates whether procedural and substantive fairness was present both before (*ex ante*) and after (*ex post*) the settlement's conclusion. Importantly, the standard also relies upon the utmost respect of class action law's three objectives and of a largely framed proportionality principle. In that way, it considers or evaluates settlement fairness at levels other than the individual class member or class's level. It considers settlement fairness as it relates to the public's interests in behaviour modification and deterrence. It also ensures that the settlement ultimately achieves and respects proportionality principles.

What is a fair class action settlement? A fair settlement was concluded pursuant to the parties' full and complete agreement, and not because its provisions are presumably fair, or because it presumably results in the best or fairest outcome. Accordingly, this settlement is one that rejects presumptions of fairness.

A settlement is a compromise between individuals, sure, that commands some respect for the fact that it results from agreement – and informed consent, arguably – by the settling parties. But in practice, this compromise is concluded at the lawyers' command, and given their expertise, on behalf of the class as a whole. The fair settlement is one that is made effective once the judge has made certain that all concerned and interested individuals' interests have been safeguarded through adequate representation, according to the standard I have prescribed above, in Chapter II.

To confirm the state of the law, a fair settlement is one that was arrived at following negotiations by and between qualified representatives negotiating at arm's length and providing, again, adequate representation to the class. Importantly, the required adequacy of representation is considered from the class's standpoint (as opposed to the lawyer's or the judge's standpoint), and any objection hinting to inferior representation is required to be interpreted as a "red flag".

Of course, a fair settlement is supported by a strong record of evidence, a qualification that is further elaborated in Chapter II. It has been concluded at a time when the class action claims are "mature" and developed enough that settlement can be envisaged and concluded. A fair settlement is also one which is known and understood by the class action representative, as further developed above.[844] This understanding must be verified by the reviewing judge at one of the hearings, through cross-examination of the representative.[845]

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[844] See text following footnote 256, *supra*.

[845] *Ibid*.

In addition, when compared to the outcome of its most likely procedural alternative – that is, an individual or group negotiated settlement, a fair class action settlement adequately compensates the class as a whole by providing similar relief to similarly situated class members. In fact, the fair settlement is *not just fair*, but it is also *reasonable* and *adequate*.[846] It is reasonable because the class claims and allegations are responsive to it. Accordingly, a settlement such as the Google Book Settlement that does not offer a resolution of the ongoing litigation but is instead considered to be a completely different business deal should probably be questioned and rejected.[847] That is, in fact, what Judge Chin of the Southern District of New York decided in March 2011. [848]The fair settlement is also adequate when compared to what class members would have obtained in non-class litigation and its resolution by settlement.

Having said that, the core of the reform I propose regarding settlement fairness is summarized below, in the following Table I:

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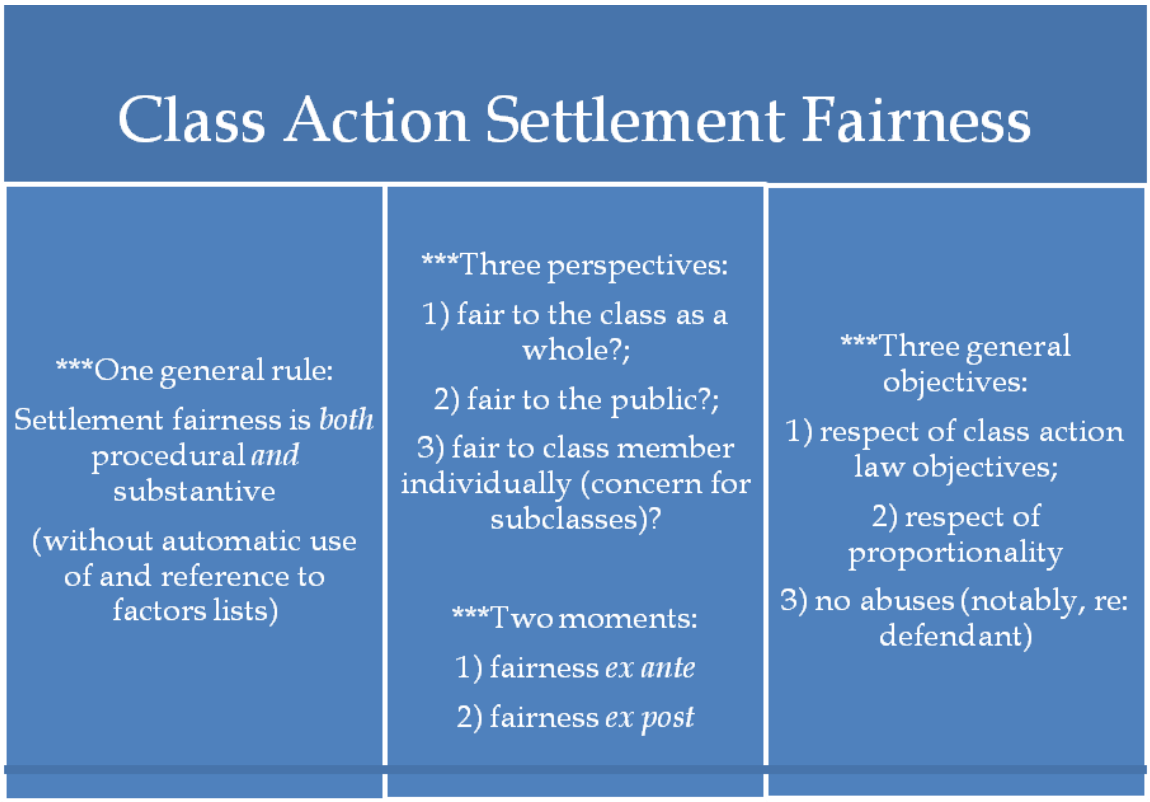
[846] On the distinction between "fairness," "reasonableness" and "adequacy," see Manual, *supra* note 12 at para. 21.62. Also see *supra* text accompanying 707ff.

[847] James Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books" (April 2009, American Constitution Society for Law and Society), online: http://works.bepress.com/cgi/viewcontent.cgi?article=1024&context=james_grimmelmann.

[848] See http://news.cnet.com/8301-13577_3-20045967-36.html.

Table I : Proposed Standard of Class Action Settlement Fairness:



As is evident from Table I, my first fundamental reform hypothesis is that a fair class action settlement contains *both* a procedural fairness component *and* a substantive fairness component. It is a settlement that was approved because it balanced or conciliated *both* components, as supported by factors or indicia of settlement fairness found relevant from the existing lists of relevant fairness factors. The two components are examined "hand in hand", in such a way that one cannot exist without the other, and that one is balanced against the other.

The *American Law Institute*'s approach to settlement fairness is helpful, in that regard, because it advocates a balancing exercise between fairness or

process and substance, and uses only the most useful and relevant factors of settlement fairness:[849]

> (1) [Whether] the class representatives and class counsel have been and currently are adequately representing the class;
>
> (2) [Whether] the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success and delays of trial and appeal;
>
> (3) [Whether] class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and
>
> (4) [Whether] the settlement was negotiated at arm's length and was not the product of collusion.[850]

Instead of standardized lists of settlement factors, the *ALI Principles, 2010* list contains four considerations fundamental to the determination of settlement fairness. I wholly ascribe to this approach advocating a fundamental consideration of both substantive and procedural fairness,

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[849] See *supra* footnote 728.

[850] See *supra* text accompanying footnotes 728ff.

independent from automatic reliance on relevant lists of settlement fairness factors. The latter factors are instead used as relevant indicia of settlement fairness or unfairness. As for the requirement of adequate representation by the class representative and class counsel, more specifically, I again ascribe to the ALI's view that it should always be evaluated at the class settlement approval stage, and not just at the certification stage. At this stage, there should be no presumptions of fairness or adequate representation.

My second, fundamental reform hypothesis suggests to examine settlement fairness from three different perspectives and at two distinct moments of the settlement process, in a way similar to the evaluation of the fairness of corporate arrangements. Fairness should be evaluated from the perspective of the class as a whole, of course, but also, from the public's perspective, given the need to prioritize the public interest objectives of class action settlements. Importantly, it should also be evaluated from the "reasonable member"'s standpoint, on a more individual scale. This evaluation cannot, obviously, involve an exact consideration of each of the individual members' interests, but it should instead ask whether the reasonable class member of each of the subclasses will be satisfied by the proposed deal (and if there are no subclasses, that standard becomes the typical, "reasonable class member").

In my view, settlement fairness should also be evaluated both before – *ex ante* – and after – *ex post* – the settlement's conclusion. This approach requires that the judge understand the settling parties' positions and interests *ex ante*, and the deal's provisions *ex post*, and how exactly the parties are made "better off" with this specific settlement outcome. It also highlights the need to consider the settlement as a true contract, in which

fairness issues might arise at a pre-contractual stage and affect the parties' rights ex post, or in the parties' unbalanced relationships.

Critics will argue that this approach is overly exhaustive and costly to the settlement judge. I will admit that it does involve a more complete and complex review of settlement fairness, from different standpoints. It requires greater efforts from the settlement judges in reviewing and understanding the agreement, and in the arguments made by parties through their counsel. This approach, in my view, is mandated by the contemporary practices of judges at class settlement approvals, which evidences arbitrary approval decisions often made on a "hunch" or following an intuition to rubberstamp the proposed settlement agreement. These practices seriously compromise fairness of class action settlements. Furthermore, my proposed approach, while demanding for judges, would not necessarily require significantly longer musing periods and longer judgments. Instead, the approach structures the reasoning that judges should hold at the settlement approval stage.

My third, fundamental proposition is more largely framed and is composed of three subpropositions. Importantly, I believe that a fair class settlement is one which accords with and promotes the underlying objectives of class action law.[851]

As such, the class settlement will be found to further access to justice when it provides compensation for a large group of individuals who would not otherwise have filed a class action and obtained compensation. Of course, this requirement of access to justice is intimately tied to the

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[851] A well-reasoned explanation from class counsel about how the proposed settlement fulfills these objectives should support the settlement. In it, counsel will explain how to balance the risk that access to justice may be lessened by an early settlement, and the risk that efficiency and judicial economy may be affected by a later settlement.

compensation process provided in the proposed agreement, and in the administration and implementation of the settlement. A settlement that does not provide an accessible, economical and fair claims process should not be approved as it will not further access to justice. Moreover, there should be tight controls on the administration and distribution process, as further described in the first chapter (notably, in the requirement that one or more reports be filed), as this also ensures that access to justice is afforded and that the members have been compensated.

In addition, a fair settlement is economical and efficient if it is more efficient administratively than having multiple independent actions and settlements. It is also more efficient if it takes a shorter amount of time to be negotiated, made effective and compensate class members than the alternative of trial. Moreover, the class settlement will deter defendants when the compensation to class members is a high dollar amount. Hence, when defendants pay higher dollar amounts, they are likely to be more deterred from future negative behaviour.[852]

Of course, this proposition that the fair settlement respect class action law objectives is consistent with the argument that fairness of settlement should be evaluated according to the settlement's objectives or ends, and according to both class members' interests and the public's. Hence, the fair settlement provides class members with the means by which they can resolve their disputes peacefully before an impartial decision-maker because it presupposes that members were given the chance to argue against and object to the settlement at the hearing, after having been given

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[852] Kenneth W. Dam, "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest" (1975) 4 J. Legal Stud. 47 at 56.

due notice. It also serves efficiency and justice by encouraging wrongdoers to respect their obligations to the public.

A second subhypothesis is the suggestion that the fair settlement should respect the proportionality principle. Practically speaking, this requires that due consideration be given to the costs, and time involved in reaching the proposed settlement, as compared to the expected outcome and projected compensation to class members. It also requires, in my sense, a broader form of proportionality that balances the energy and costs spent on achieving the deal, versus the energy and costs spent to approve that deal and make it effective.

The final subhypothesis requires courts to monitor possible abuses in class action settlements, and verify the defendant's position within the settlement. Accordingly, settlements that result from a defendant being forced to settle should be firmly rejected. Evidence of that abuse may be difficult to obtain, but in any event, red flags suggesting abuse should not go unnoticed.

Aside from this three-parted hypothesis, the fair settlement should be one rigorously reviewed and properly questioned as an outsider would—with a fresh eye. Because the fair settlement is approved by a judge who will prefer an inquisitorial role at the fairness hearing, true fairness of settlement will depend not just on the reviewing process's adequacy and fairness, but on the judge's role. Again, no presumptions of fairness should influence the judge's decision to approve or deny proposed class settlements.[853]

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[853] Contra: John Bronsteen & Owen Fiss, "The Class Action Rule" (2003) 78:5 Notre Dame Law Review 1419 at 1447-1449 ("[w]hen a court reviews a settlement, […] it gives great deference to the parties' choice in the bargaining process and does not exercise its

PART II: CLASS ACTION SETTLEMENT PRACTICES

CH. IV: CLASS ACTION SETTLEMENT APPROVAL PRACTICES OF NORTH AMERICAN JUDGES

In the first three chapters of this thesis, I have critically discussed the positive law relative to settlement processes (Chapter I), to the roles of the principal settlement actors (Chapter II) and to the concept of settlement fairness (Chapter III). In this last chapter (Chapter IV), I discuss class action settlement practices in my four focus jurisdiction.

Specifically, I begin this chapter by introducing my choice of research methodology, justifying my use of empirical research, and explaining why the qualitative interviews I conducted generated crucially important data in this context. In a second subsection, I discuss my qualitative interviews of judges; outlining the distinctions and similarities in judicial practices; testing the plausibility and workability of the reform hypotheses suggested in the first three chapters; discussing the reforms suggested by the judges interviewed.

More specifically, this subsection will serve to evaluate the fairness of process and outcome in current practices, to examine which criteria judges consider important at the fairness review stage (and their correspondence or not with the proposed standard), to seek support for the assertion that the current fairness standard, roles of the principal settlement actors and processes of approval are either unclear or ill-defined, to discuss what judges consider their role to be at the review stage, to determine how judges can be placed in a better position to assess settlement fairness and how their role can be improved, and ultimately, to test the plausibility of

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independent judgment for the remedy. It essentially decides only whether the settlement is manifestly unjust.").

my hypotheses for reform provided in prior chapters, and aimed at improvement of the fairness of class settlement approvals.

In this last, fundamental chapter on judicial practices, I briefly review the positive law and reform hypotheses elaborated in my chapters one to three, and thereafter use the data from the seventeen interviews of judges to discuss: a) how the law has been applied by the courts throughout North America; b) what are the similarities and differences in the practices of the different courts/jurisdictions; and c) how judges would reform that area of the law, and in some instances, whether these judges consider my proposed reform hypotheses to be plausible.

In my thesis' conclusion, I discuss what the law should be, and what reform principles should be implemented. This study based on qualitative interviews of judges is a first in North America as no other scholar has, to my knowledge, chosen to conduct interviews of judges about their practices in class actions settlements, with the ultimate goal of providing solutions for reform.

I. RESEARCH METHODOLOGY AND SUMMARY OF DATA

a. Choice of Method[854]

Class actions are procedural vehicles of great importance to our society. They affect individuals, businesses, and society at large. They affect developments in the substantive law, and in politics and the economy. Hence, finding the best method and methodology to study these actions is

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[854] The terminology "method" herein refers to my chosen form(s) of data collection and analysis, whereas "methodology" or "approach" will refer to the technique used for collecting and/or analysing data. On this issue, see Carol Grbich, *Qualitative Data Analysis – An Introduction* (London: Sage Public., 2009).

crucial, especially in a context where procedural reform is envisaged. Indeed, since the legal system's effectiveness is in great part dependant on citizens' abidance to law and on their acceptance of the rules, efforts must be made to make this system coincide with contemporary social values and needs, and with modern legal culture.[855] How can we best analyze these objectives, effects, and trends to ultimately support suggestions for reform in class action law? What is the most efficacious methodology to obtain trustworthy data about the resolution of class action disputes by trial and/or settlement?

Legal theory, mostly in the form of doctrine, must be given significant weight in civil procedure reform. Quantitative studies based on the judicial outcomes of reported court cases and statistics based on these outcomes are also useful. There are, however, many issues in civil procedure that can be more adequately addressed, discussed and eventually resolved with the use of empirical research.[856] For instance, one way to assess whether the deterrence objective is met in a class proceeding is by empirically testing whether the defendant's behaviour has changed since the lawsuit was filed. One may ask, for instance, whether the lawsuit has encouraged the defendant to change its internal environmental policies to prevent further toxic waste. In addition, the effectiveness of the

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[855] I was tempted, in this thesis, to draw parallels and organise my chapters around cultural considerations. I am a firm believer that changes in procedural law, and class action law, depends upon the evolution of societal movements and legal culture: Catherine Piché, "The Cultural Analysis of Class Action Law" (2009) 2 J. Civ. L. Stud. 101. However, I also needed to choose limited angles and theories for the thesis and could not, for lack of time or space, relate class action settlement law developments with changes in culture in the four focus jurisdictions. This will be for a later scholarly project!

[856] Bryant G. Garth, "Introduction: Toward a Sociology of the Class Action" (1981-82) 57 Ind. L. J. 371 (noting that qualitative research "needs to be supplemented by more 'qualitative' empirical studies that can 'open [..] to public view the back regions and activities of processing institutions'.")

class action–notably, as a means of getting long-term benefits for particular groups[857]–can be evaluated with the use of empirical research. This type of research could, notably, consider whether workers are, in fact, treated more fairly and equally by their company in the years following judgment in an employment discrimination class action case.

One example of a study that brilliantly integrated both theoretical and empirical approaches to civil procedure in the class action law context is Bryant Garth's analysis of concluded federal class actions from the Northern District of California.[858] In it, Garth sought to assess critically the "'social change' impact of the class action."[859] He used case studies and interviews with class counsel and representatives, and organized the class actions he reviewed in three categories. He argued that empirical research is relevant to the study of class action litigation because it examines

> the impacts of the full range of empowering and nonempowering features of class action litigation […] investigates particular revelations from discovery, the denial or granting of various motions in the case, *the judges'*

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[857] *Ibid* at 380.

[858] Garth, Bryant G., "Power and Legal Artifice: The Federal Class Action" (1992) 26:2 L. & Soc. Rev. 237. For further examples of empirical studies of class action litigation, see e.g. James Bohn & Stephen Choi, "Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions" (1996) 144 U. Pa L. Rev. 903 (where the authors reviewed a sample of initial public offerings that generated class action litigation); Willging & al., "Empirical Study", *supra* note 5; Janet C. Alexander, *supra* note 5 (where the author studied the size of settlements in computer and computer-related securities class actions relative to the strength of the case); B. G. Garth, I.H. Nagel & S.J. Player, "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Actions" (1988) 61 S. Cal. L. Rev. 353.

[859] Garth, *ibid* at 238.

> *seeming attitude toward settlement or the merits, the shifting of legal theory or class representatives, or simply the effect of delay and inactivity; and it [investigates] how ground-level events affect the lawsuit.*[860] [italics added]

In the field of judicial law, more specifically, two professors of political science each recently published interesting and important books entitled "The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada" and "The Transformation of the Supreme Court of Canada: An Empirical Examination".[861] For this purpose, the first author, Muttart, analyses approximately five thousand cases decided by the Supreme Court of Canada,[862] and the second author, Songer, conducts extensive interviews with former justices of this same court and provides accounts of how decisions are made and another empirical analysis of more than three thousand cases.[863] As such, the first study aims to review

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[860] *Ibid* at 269. In the class action settlement context more specifically, one report interestingly studies the class action litigation and settlement practices in four federal district courts, see Willging & al., "Empirical Study", *supra* note 5. In this report, the authors find that across their four districts, a substantial majority of certified class actions result in settlements (the range is from 62% to 100%). By contrast, the Report finds that settlement rates for cases not certified range from 20% to 30%. *See ibid* at 60. Finally, and interestingly, the report finds no particular relationship between timing of certification and settlement. *See ibid* at 61-62. It would be interesting to see how these tendency and statistics have evolved until today. For another interesting empirical study in class action law, see Geoffrey P. Miller, "Class Actions in the Gulf South Symposium – Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype" (2000) 74:5 Tul. L. Rev. 1681.

[861] David Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto, Ont.: Univ. of Toronto Press, 2007). Also see Donald R. Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto, Ont.: Univ. of Toronto Press, 2008).

[862] See Muttart, *ibid*.

[863] See Songer, *supra* note 861.

what criteria guide the Supreme Court in its decision-making and concludes that the institution remains predominantly legal as opposed to political.[864] The second study discusses the impact of institutional changes on the proceedings and decisions of the Supreme Court from 1970 until 2003.[865]

While contrary to Muttart, I do not strictly discuss judicial behaviour, his study is most relevant to my thesis as it serves to support the importance of empirical work in judicial law. As he explains in his introduction:

> At present, jurists routinely describe judicial behaviour without having first conducted a study to verify the accuracy of their descriptions. Legal philosophers habitually advocate changes to the form of judicial method and process without prior study of the actual behaviour of judges. For example, H.L.A. Hart, in The Concept of Law, discusses only four cases in the main body of his text and only two more in his postscript. […] Resolution of these controversies requires empirical investigation; the endless parsing of contending theories has proven grossly inadequate.

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[864] See Muttart, *supra* note 861.

[865] See Songer, *supra* note 11.

> The limited samples of cases cited by jurisprudes have resulted in most jurisprudential theories being constructed upon weak foundations. A well-supported superstructure is lacking. Jurisprudential writing is too often characterized by allegation without verification, by idiosyncratic impression instead of rigorous research, […] The investigation of actual judicial behaviour constitutes the first step towards closing the empirical gap.
>
> Jurisprudence has been notoriously feeble in supporting its philosophical analysis with empirical research. There is thus a gap – what I call the empirical gap – between what judges actually do and what jurisprudential writers say they do.[866]

With my thesis, I too sought to close the "empirical gap" by interviewing judges involved with class action settlement approvals. This project's methodology is important because it qualifies as research *about* law and judicial practices. Harry Arthurs rightly advocates, in his report entitled *Law and Learning*, that research *about* law is fundamental, as opposed to

[866] Muttart, *supra* note 861 at 3-4.

research *in* law.[867] It is fundamental because it is "designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law."[868]

b. Qualitative Interview Methodology

This thesis' principal objective is to study the class action settlement practices of judges located in four target jurisdictions, using both legal scholarship about class action law and data from the qualitative interviews of judges from these same four target jurisdictions. Accordingly, I review and criticize the positive law derived from legal scholarship, case law and legislation regarding settlement approval processes (Chapter I), the roles of the principal settlement actors (including the role of the settlement judge) (Chapter II) and the theories of settlement fairness (Chapter III).

However, this doctrinal analysis is insufficient to

i. Fully understand the controversy over class action settlements and their approvals;
ii. Learn about trends and issues in the practice of class action settlement negotiations and approvals;
iii. Measure the fairness of processes and outcomes of class action settlements; and
iv. Test my hypotheses for reform of that area of the law.

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[867] *Law and Learning : Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (H. Arthurs, chair) (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983).

[868] *Ibid* at 66.

That is why I chose to interview judges with knowledge and experience in class action settlements. Accordingly, my qualitative research was primarily and fundamentally *evaluative*, and secondarily, *informational*. It was evaluative because it permitted an evaluation by experienced judges of the relevancy, adequacy, and feasibility of my initial reform hypotheses. It was also informational because it taught me about the law's applications and practices, through the data provided by the judges as observers.

I chose to interview judges who were involved in class action litigation in four target jurisdictions: Quebec, British Columbia, Ontario, and in one U.S. federal court (I leave this federal court unnamed for reasons of confidentiality). In the course of the interviews, I sought to discuss the organization of the courts and varying processes at play in these courts, evaluate the similarities and differences in the roles of the settlement actors, discover the differing practices in settlement approvals and the definitions of settlement fairness, and finally, grasp differences, if any, in the judges' perception of their role as settlement judges. Ultimately, I wished to test the plausibility and workability of my class action settlement theory and reform principles in the course of the interviews.

With respect to my chosen qualitative methodology, I used a non-random purposive sampling technique aimed at identifying judges in the four jurisdictions involved in class action litigation in the last few years. Some of the judges I interviewed suggested that I make contact and interview practitioners who were active in some of their cases. As a result, I interviewed seventeen (17) judges from the four jurisdictions and two (2) practitioners specialized in class action work.[869] The typical interview

[869] I have chosen not discuss the data and findings from the practitioner interviews in this thesis, mostly because the sampling was insufficient and non-purposive.

lasted approximately one hour and a half (1 ½ hour), but a few interviews were longer. The interviews were generally conducted in person, with the exception of four of them which were conducted over the telephone.

Table II: Number of Interviews by Profile of Interviewee:

Profile of Interviewee	
Ontario Judges	5
Quebec Judges	6
British Columbia Judges	5
U.S. Federal Courts Judges	1
Practitioners	2
Total interviews of judges	17
Total number of interviews	19

The selection of judges was an interesting and lengthy process. I first began by contacting Chief Justice François Rolland of the Superior Court of Quebec in September 2009, to request permission to conduct the interviews and seek assistance in my first contact with the judges. Justice Rolland enthusiastically approved the project and discussed it with some of the judges of the Superior Court involved in class action work. A few major actors of the Quebec Superior Court of Justice agreed to participate.

I was placed in contact with these judges. Having enjoyed the experience, they put me in contact with three other judges whom I later interviewed.

During the course of the Quebec interviews, I randomly met two judges from the Ontario Superior Court of Justice and British Columbia Supreme Court with coordinating experience, who both agreed to participate in the interview process, and helped me recruit other judges to interview. In 2010, I completed my series of interviews with one Ontario judge and one U.S. federal court judge. With the exception of these two judges, all interviews were conducted from October 2009 through to December 2009.

The judges interviewed were generally selected according to their experience and willingness to participate and discuss not just their practices, but the practices of the court in general. A majority of the judges - seven (7) of the seventeen (17) judges – had experience coordinating class actions. Accordingly, this project describes and analyses data from experienced interviewees.

The data found from the interviews is reliable in terms of expressing the individual opinions of the judges as well as the shared, official opinions of the court as a whole. It is also interesting and important in establishing tendencies in the judicial practices of the four jurisdictions, and throughout North America. Of course, because the class action settlement approvals are complex and multivariate situations, without more data I cannot tell with certainty what other practices and opinions may be among the remainder of the judges.

In the course of the interviews, I asked open-ended questions, focusing on three central issues: (1) the judges' experiences and processes followed when evaluating and approving class action settlements, their perceptions

and opinions of settlement processes and outcomes, and of the roles and responsibilities of the settlement actors, (2) the definition and criteria of settlement fairness, and (3) their role as settlement judges. When they mentioned or identified areas in need of reform, I asked them to specifically identify the kinds of changes that they thought would be worth considering and implementing, and asked, at the end of the interview, how plausible they felt my hypotheses were. Nonetheless, a major part of the interviews was spent discussing their judicial practices approving settlements, and evaluating their respective experiences while doing so. Again, my questions tended not to be directive, as I wanted to let the interviewees speak for themselves. Sample lists of the questions posed both in French and in English are attached in **Appendix I**.

In this Chapter's Section II below, participant responses to my questions are presented and analysed. The major purpose of the analysis is to organize the responses to highlight overall patterns and differences, while testing the plausibility of my recommendations for reform (which recommendations will be discussed in the Conclusion). Five (5) of the six (6) interviews of Quebec judges were conducted in French, and for the thesis' purposes, I translated all relevant extracts discussed herein.

I conducted the interviews under the promise of complete confidentiality. To best protect the confidentiality of the interviewees, I applied the following rules to my report of the interviews' qualitative data:

1. I deleted from the reproduced extracts of interview transcripts all names, references to cases or other judges, or indicia that would allow an objective reader to identify the judge being interviewed;
2. I invariably used, for all the judges interviewed, whether male

or female, the pronoun "he" or "his", in order to make it impossible to identify whether the judge being interviewed is a man or woman;[870]

3. In my analysis of the transcripts in the N'Vivo software (a method I further discuss below), I used codes to organise the data according to the jurisdiction of the interviewee judge, without making possible any association to the gender, name or characteristics of the judge;
4. I described and analysed the data with a very high sensitivity to safeguarding the identity of the interviewees and to making it impossible to identify them. There are several kinds of researches I could have conducted but chose not to, such as researches involving the gender and age of the interviewee, etc. Indeed, in Ontario, for instance, identifying the judges could be easier, since there are very few judges on the class action team. Accordingly, I was even more careful in my presentation and analysis of the Ontario data. In addition, since I only interviewed one U.S. federal judge, I was careful not to indicate at which court she sits and did not include any indicia potentially allowing identification. In the end, additional cross-analyses could have been conducted, but were not conducted for reasons of confidentiality.

An ethics approval was sought and obtained from McGill University's Research and Ethics Committee. I attach a copy of the ethics application in **Appendix II**. The approval obtained was an expedited one because the

[870] It would have been interesting to discuss the differences in judicial practices by gender, but given the promise of confidentiality, a gender-based analysis would have permitted an external reader to identify the judge being interviewed. That is why I have chosen instead to use a gender-neutral approach.

proposed interviewees were not vulnerable individuals, and because confidential or sensitive information was not solicited. The approval granted by the Committee was made conditional to the interviewees' written consent to participate, the maintenance of confidentiality of the interviewees' identities and the safekeeping of the transcripts of the interviews. As indicated above, the confidentiality of the interviewees was entirely preserved. The written, informed consent of the interviewees was carefully obtained in each and every one of the seventeen interviews. The written consent forms and transcripts of the interviews are locked in my office. I attach a copy of the sample consent forms in **Appendix III**.

The qualitative phase of the inquiry consisting of interviews of judges involved: 1) structuring a canvass for the interviews (see Appendix I for my lists of questions); 2) selecting the participants; 3) contacting these participants and scheduling appointments for the interviews; 4) conducting the interviews and taking notes; 5) having the interviews transcribed[871]; 6) establishing a coding grid and coding the interviews; 7) analyzing the interviews; 8) producing a report of the interviews (Chapter IV).[872]

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[871] The person I hired to transcribe the interviews agreed by writing to work under conditions of complete confidentiality.

[872] For the purposes of the coding exercise, I used special codes for each of my interviewees to preserve confidentiality: the year of the interview (2009 or 2010); "J" for judge, "O" for other (practitioner); "CL" for common law jurisdiction; "CC" for civil law jurisdiction; "O" for Ontario; "Q" for Quebec; "BC" for British Columbia; "US" for United States. For example: 2009-J-CC-QC.

However I used different codes when referring to a specific interview extract. Indeed, the extract is a great and easy way to identify the interviewees; accordingly, I have decided to randomly refer to the interviews as Interview No. 1, Interview No. 2, Interview No. 3, etc. Only I know which interview number refers to which judge.

The data from the qualitative interviews reflects the judicial practices of seventeen judges in the target jurisdictions. It contains information principally relative to the effectiveness and fairness of settlement practices, and incidental information about their efficiency. A lot of attention was given to issues such as whether the judge feels bound by the existing criteria of settlement fairness, whether he thoroughly and independently examines the documentation supporting the proposed agreement, and whether (and to what extent) he relies on the representations made by counsel regarding the fairness of the proposed agreement. Issues such as the need for settlement notices, the conduct of fairness hearings, the adequacy of representation, the weight given to objections were similarly addressed and are further detailed below.

c. Specific Analytical Approach: Testing the Plausibility of Reform Hypotheses – or "Closing the Empirical Gap"[873]

The preferred analytical approach for this thesis is one that tests the plausibility of my reform hypotheses and intuitions. Of course, at the outset, because my chosen methodology resembles modified grounded theory, a few words about that theory are warranted, before I willingly leave it aside.

Grounded theory is a methodological strategy that "locates the phenomena of human experiences within the world of social interactions."[874] It was developed by Barney Glaser and Anselm Strauss to generate theory from real life experience.[875] In their book entitled "The

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[873] Expression taken from David Muttart, *supra* note 861.

[874] Grbich, *supra* note 854 at 71.

[875] Barney Glaser & Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine Publishing Company, 1967); Anselm Strauss & Juliet

Discovery of Grounded Theory", Glaser and Strauss justified grounded theory as a challenge to deductive approaches and as a way to encourage students to defend the validity of their own scientific knowledge.[876] In fact, Anselm Strauss and Juliet Corbin later defined grounded theory as:

> […] one that is inductively derived from the study of the phenomenon it represents. That is, it is discovered, developed, and provisionally verified through systematic data collection and analysis of data pertaining to that phenomenon. Therefore, data collection, analysis, and theory stand in reciprocal relationship with each other. One does not begin with a theory, then prove it. Rather, one begins with an area of study and what is relevant to that area is allowed to emerge.[877]

Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Newbury Park, CA: Sage Publications 1990). See also Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (London: Sage Publications, 2006).

[876] Glaser & Strauss, 1967, *ibid*.

[877] Strauss & Corbin, *supra* note 875. Kaysi E. Kushner, Raymond Morrow and Kathy Charmaz have all three argued in favour of using grounded theory as an abductive approach. Charmaz, *supra* note 875 at 103-4, and Kaysi E. Kushner & Raymond Morrow, "Grounded Theory: Feminist Theory, Critical Theory: Toward Theoretical Triangulation" (2003) 26:1 Advances in Nursing Sci. 30. In her treatise, Charmaz explains that the abductive approach requires that one examine and scrutinize the data, considering all possible theoretical explanations for the phenomenon studied, formulating a hypothesis for each explanation, and verifying each hypothesis empirically by re-examination of the data and choosing the most plausible explanation.

One of my stated objectives with the interviews was to better understand their "lived" practices and experiences with class action settlements through a reflexive research process.[878] But it was also, much more fundamentally, to test my reform intuitions and hypotheses in the first three chapters of the thesis. In this sense, I have used an approach similar to Muttart's, who advocates the use of empirical work to "close the empirical gap of jurisprudence" and test several theories of legal reasoning discussing judicial attitudes and approaches at the Supreme Court of Canada.[879]

This approach is similarly cautioned by French professor of Sociology François Dubet, who argues in favour of a sociological intervention that relates the researcher's analysis and the discourse of one chosen real-life actor.[880] Dubet in fact explains that forms of reasoning and hypotheses may be validated by the sociologist through a research project that seeks to learn the experience of the actors.[881] Hence, in Dubet's view, to be credible, the sociological analysis must relate to the experience of the actors.[882]

My thesis seeks to test the plausibility of reform hypotheses suggested in Chapters I, II and III, to later conclude with final recommendations for

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[878] Glaser & Strauss, 1967 *ibid*.

[879] See Muttart, *supra* note 861 at 3-5.

[880] François Dubet, « La vraisemblance : entre les sociologues et les acteurs » (1994) 44 L'année sociologique 83 ["Dubet, La vraisemblance"]. Also see François Dubet, *Sociologie de l'expérience* (Paris, Coll. Seuil : 1994).

[881] Dubet, "La vraisemblance", *ibid* at 107 (« la vraisemblance, c'est-à-dire de la reconnaissance d'une théorie sociologique par les acteurs concernés, le point de départ d'un effort méthodologique… le sociologue doit trouver matière à construire ses raisonnements et ses hypothèses, il peut aussi y fonder certaines formes de validation. »).

[882] *Ibid* at 91.

reform. I use the critical analysis of the positive law from my first three chapters as the theoretical framework from which I draw reform principles in the form of hypotheses. The plausibility – or *vraisemblance* – of these hypotheses is later tested against the qualitative data from the interviews and used as an indicator of plausibility, adequacy and relevance, to build reform theory in the conclusion. Accordingly, in the thesis' conclusion, I bring together my hypotheses for reform, enunciated in chapters I to III, with the data found in the interviews, test their plausibility with the opinions of the judges, then conclude.

This initial theoretical framework has, of course, influenced what questions were asked, what was observed, and how supplementary discussion topics arose in the interviews. Nonetheless, to maintain all objectivity possible, I attempted to isolate my analysis of the positive law as best possible when I conducted the interviews. I resolutely left aside the reform hypotheses I had elaborated before beginning the interviews in the summer 2009 (which take the form of a proposal, in **Appendix IX**), to ask the judges open-ended questions, and require their candid opinion and as much information as possible regarding class settlement approvals. Importantly, when judges asked me to discuss my suggestions or proposals for reform, or what my impressions about the current legal regime were, I gently responded that I preferred to discuss these topics at the end of the interview. Accordingly, their responses were sincere and as uninfluenced as possible by my prior hypotheses and proposals.

d. Use of the N'Vivo Software

In this research project, I used the qualitative data analysis software called N'Vivo to organise and analyse my data.

To optimally assemble, present, and analyse the qualitative data from the interviews, I had the interviews transcribed, then imported the data from Windows into N'Vivo. Once the data was imported into N'Vivo, I proceeded to code it according to a list of themes "*en vrac*" relevant to my project. My first list of themes – so entitled "free nodes" in N'Vivo - is herein appended in **Appendix IV**. After having coded a few of the transcripts according to the list of free nodes, I re-shuffled the nodes and created a coding tree, which N'Vivo vocabulary refers to as "tree nodes". A copy of this tree is also appended in Appendix IV. The tree aims to separate the themes in the three larger themes of the thesis: the processes and actors, the settlement fairness factors and the settlement judges.

Throughout the course of my analysis of the data, I also attributed characteristics – or attributes – to certain of the judges. For example, I created an attribute entitled "inquisitorial", with a choice of three values: "Yes", "No, but Thinks Should Be", and "Does Not Think Needs to Be". The list of attributes is in **Appendix V**. With these attributes, I was able to launch queries. For example, I related the jurisdictions at stake with the attribute "inquisitorial", to be able to understand which jurisdictions are more inquisitorial, and whether judges in general are being inquisitorial, etc. A list of the queries conducted in also reproduced in Appendix V. Finally, I developed theory for each stage by drafting memoranda relating to each category of data, in a way to further define the properties, define relationships between the categories, and/or identify eventual gaps.

e. Limitations to Project

I have found that class action cases and their settlements are interpreted and perceived by judges in different ways, and accordingly, that fairness will always remain somewhat subjective. Hence, this study has one first

major limitation: each and every judge inherently possesses a personal style and approach in case adjudication, which characteristics are beyond my control and inject an element of uncertainty in the project's conclusions. The differing styles and approaches generally play out along a spectrum of court intervention in adjudication, going from "less interventionist" judges to "more interventionist" ones. Put differently, and as I will further outline below, certain judges prefer to remain more traditionally adversarial in stance, while others feel comfortable asking questions and being deliberately more inquisitorial. Certain judges feel that they should not get in the way of compromise, while others feel that it is their duty to question the proposed settlement to ensure its ultimate fairness. Certain judges consider themselves to be true protectors of absent class members; others believe that their only duty is to verify that the proposed settlement does not negatively affect the rights of class members.

While some may argue that these styles and characteristics are a factor of personality and personal preferences, and therefore affect the reliability of my conclusions, I strongly believe that beyond the personal preferences and styles are serious tendencies and trends in judicial practices that are worth outlining, building upon and analyzing. In fact, the individual perceptions, opinions, outcomes, variations or cultural nuances in class action settlements judicial practices are seldom predictable with certainty. Moreover, the meaning and meaningfulness of such impacts, variations and changes are likely to be highly specific to particular individuals in specific circumstances. Having said that, this project will stand back from the individual experiences of the judges interviewed in order to examine the patterns of change and tendencies in practices that cut across the specifics of individual styles and jurisdictions.

Another limitation to this project is my translation of the Quebec interviews. I chose to prioritize uniformity of language in the thesis. Accordingly, I translated all French extracts of my five Quebec interviews to facilitate the evaluation of the data. Although I have done my very best to preserve the essence and specifics of these judges' language, there may be small differences in the contents of the original French version and the translated English version of these interviews. I do not believe that these differences, if any, are important enough to affect this project or its conclusions.

Another limitation is the necessary evolution of the interview questions in the course of the project. Indeed, I elaborated a first list of interview questions which was used in the first interview. I adapted this list after the first few interviews, adding or subtracting a few of the original questions in order to cover the grounds more adequately. I also changed the questions' formulation slightly, according to the jurisdiction, and to conform with the applicable law of the jurisdiction at stake. The variations in language, between French and English, are an additional consideration and limitation, as previously noted. In the end, the interviews conducted covered the same grounds but occasionally addressed slightly different questions that lead to varied discussions. These variations do not affect this project's conclusions.

Finally, one last limitation to this research project is the lack of time I have to explore all of the issues that have arisen from the interviews. These issues will be explored in the course of later, distinct research projects.

Generally speaking, because the judicial practices and opinions are very complex or multivariate, without more data I cannot tell with certainty what other practices may exist. Therefore, some tentative impressions and

conclusions drawn below could be confirmed with further qualitative data. Importantly, we must remember François Dubet's argument that the impressions of the actors are indicia of plausibility, but are not the ultimate truth. The opinion of these actors is one opinion among many. It is a mere indicator that my reform principles may work and are plausible.

II. JUDICIAL PRACTICES IN CLASS ACTION SETTLEMENT APPROVALS ACROSS JURISDICTIONS

In this section, I conduct a cross-jurisdictional analysis organized according to the following clusters: the civil law province of Quebec, the Canadian common law provinces (Ontario and British Colombia)[883] and the United States federal courts. This analysis provides, first, a thick description of the practices to allow an understanding of the phenomenon studied and to support my interpretations about meanings and significance.[884] For this purpose, an analytical framework approach will be used, based on the processes followed by the judges in the focus jurisdictions, and highlighting the differences between the jurisdictions. I have chosen to proceed by comparing the jurisdictions, instead of the judges interviewed, to best preserve the confidentiality of their identity.

This section also serves to analyze the qualitative data derived from the interviews and organised in the N'Vivo software. This content analysis will consist in reducing, organising and interpreting the qualitative data, as well as identifying its core inconsistencies and meanings. Ultimately,

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[883] Because they are both common law jurisdictions, Ontario and British Columbia descriptions will be grouped.

[884] Clifford Geertz, "Deep Play: Notes on the Balinese Cockfight", in *The Interpretation of Cultures* (New York: Basic Books, 1973), at 412-53. Also see Michael Quinn Patton, *Qualitative Research & Evaluation Methods,* 3d Ed. (London: Sage Publications, 2002).

tentative explanations, impressions or conclusions will be provided for each theme and jurisdiction, explaining the phenomenon of class action settlement approval and providing solutions for reform.[885] Since, the judges are either common law or civil law trained, and sit in jurisdictions that have differing legislations and practices which play out in different approaches to adjudicating class action settlements, I will seek to highlight these differences and discuss in the conclusion how they affect my previous hypotheses for reform.

a. Introduction

i. Class Action Statistics

I systematically began all the interviews with a very general question that was meant to introduce the topic of research and also, to break the ice, so to speak. With my first question, accordingly, I sought to learn how many years or how much experience each interviewee had with class action work, and specifically with settlement approvals. The answers were varied, and generally went from a little more than two years of intensive experience with class actions to more than ten years of experience, and from one settlement approval to more than ten. Because I anticipated that the experience of the interviewee might influence how he perceived the process, standard of fairness and judicial role, I attempted to include in this project a classification entitled "Years of Experience Judging Class Action Settlements". I had some problems coding the interviews within this classification because certain judges defined their experience according to the number of class action cases they handled, and others according to the number of class action settlements they evaluated.

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[885] See Patton, *ibid* at p. 489.

Accordingly, I found that the experience with class action work varied according to the jurisdiction of the judge. In Quebec and British Columbia, the judges interviewed all had more than five years of experience on the bench, all had experience handling class action cases, and all had evaluated at least one class action settlement. Because their caseload is not specialized, these judges, on the whole, probably have less experience than Ontario judges with class action work. However, among the Ontario judges interviewed, some had few years of experience doing exclusively class action work. For these reasons I found the classification based on the experience with class action settlements impossible. I instead chose to classify the judges according to their jurisdiction.

Of course, one important word of caution is warranted. Since the interviews were conducted under the promise of entire confidentiality, this thesis cannot allow the interviewees to be identified in any way. My choice of coding and classifications respects that necessity and limitation.

In the interviews' beginning, I always sought to ask judges about class action statistics in their jurisdictions. In doing so, I principally wanted to find out whether these judges evaluated that settlements were the most prevalent outcome to their class action cases. The judges unanimously responded positively, explaining, for example: "(...) again, the way the class actions work, very few real class actions go to trial. Very few really go to trial. They're settled."[886] In Quebec, one judge was more specific in stating that approximately 10% of all class action cases are scheduled for trial, and of that percentage, half (50%) are settled the day of the trial's beginning or during the duration of the trial.[887]

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[886] Interview No. 13.

[887] Interview No. 5.

In fact, the high rates of settlement also get the judges worried about the consequences to the class action system. One judge explained that settlement is the "rule":

> "*All of them (settle). I mean, it's not even a majority. It is so rare for there to be a trial, that it's almost become [the rule]*… And that's one of the interesting issues in a class action work, that because of the cost and the risks and so on, they settle. So the certification, it's a question often of at what stage. I mean, there'll be the certification motion and then sometimes it's a settlement that is certification plus a deal, sometimes it follows after. *One of the things that may be wrong in this area is that everything is going to settle*." [italics added]

Another asked:

> […] are these settlements right? Why are they being settled? Maybe it's because they're all fair. Part of it is because maybe the companies feel that in economic cost to them, the cost of defending the thing is far worse than the amount that they're gonna have to pay, thinking that they're gonna have to pay something. That's what prompts settlements, isn't it?[888]

[888] Interview No. 13.

A related question about statistics was whether, within the number of class action settlements, there are more before certification or more after. On that issue, the judges answered less categorically. Many judges were, in fact, unsure how to respond. Most answered that the proportion was half-half. Several judges indicated that they felt that there were a greater number of pre-certification settlements. Interestingly, one judge ventured to explain the phenomenon, and reasoned that the increasing number of pre-certification settlements is due to the looser requirements to certification:

> "I think the reason that you're maybe seeing more precertification settlements is because, (...) it seems to me that in the earlier days of class actions, defendants fought on certification, and then, once they lost certification, they turned to thinking about settlement because some of these cases, they'd be wiped out if they went to trial if they lost. Then, as it became apparent that certification was going to be relatively easy to achieve, I think some defendants thought, "why are we fighting on certification? We may as well turn our minds to settlement right now". And so you got precertification settlements happening."[889]

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[889] Interview No. 11.

When asked whether they felt that settlements were prevalent in multi-jurisdictional class action cases, most judges were unsure how to respond, but felt that the tendency was to settle these kinds of larger, more complex cases. Generally, my interpretation of the Canadian judges' answers regarding class action statistics is that they are unsure how to respond given the lack of empirical statistics regarding class proceedings in Canada.

The interviews also sought to establish the number of settlement denials. When asked whether they ever denied a proposed settlement, the great majority of judges answered by the negative, with the exception of two judges who explained having first denied a proposed agreement, and after having received amendments to it subsequently approved it. A number of judges, however, indicated how problematic they think the tendency to approve class action settlements is. One judge said bluntly: "I think counsel probably think it's pretty automatic. That […] bothers me."[890] While not many judges have ever denied settlements completely, they realise that saying no to a proposed settlement will not please the lawyers. One judge said: "Q: Have you ever said a definite no, something like "this isn't going to go through, no way"? R: No, I can't remember that I've done that. I've sort of made counsel very unhappy. I've said, "here's what I believe is appropriate" and they then changed it. I guess they realise that I'm not gonna change my mind."[891]

To better understand the varying practices of the focus jurisdictions, it is important to explain the differences in court organisation and class action caseloads. For this purpose, I also asked the judges in one of my first questions, how their court was organised, how cases were distributed,

[890] Interview No. 9.

[891] Interview No. 16.

whether there were specialised judges, and what their caseload consisted of. In doing so, another objective was to be able to interpret the interviews' transcripts according to their experience as class action judges involved in class action settlement approvals.

ii. Court Organisation in Focus Jurisdictions

Court organization of the class action work differs in the four jurisdictions. I will herein first explain how Montreal (Quebec)'s Superior Court of Justice and Vancouver (British Columbia)'s B.C. Supreme Court are organized, based on the explanations given by these jurisdictions' judges. These two courts are similar in organisation in that they both comprise over seventy non-specialised judges with general caseloads that include class action work *and* other kinds of cases.

Quebec is a province governed by civil codes and the civil law, but civil trials are conducted within a framework heavily influenced by the common law courts.[892] Accordingly, Quebec judicial practice and organisation, as well as the roles of the judge and the lawyers, are considered to be directly influenced by the common law. Nevertheless, I will outline several differences between the attitudes and practices of judges in Quebec as compared with those of judges from the common law provinces, differences that may be explained by the civil origins of Quebec.

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[892] *Lac d'Amiante, supra* note 413 at paras. 33-34, citing *Vidéotron Ltée* v. *Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065 at 1080-82, *per* Gonthier J. ("[c]haracteristics such as the adversarial nature of the proceeding, the roles assigned to lawyers and judges, the direct examination of witnesses before the court and, now, the use of examinations on discovery, all demonstrate how significant [the contribution of the common law has been] to the civil procedure of Quebec […].") Also see *Globe and Mail*, *supra* note 451 at para. 28.

The Quebec Superior Court of Justice handles class action cases, but class action cases filed in the Montreal region are managed out of Montreal. Each of the eighty Montreal Superior Court judges has approximately two class action cases to manage at all times, while Vancouver judges only have to manage class action cases on occasion. In fact, my understanding is that some of the judges I interviewed in Vancouver did not have any class action work for a long time. In Montreal, there is a class action "chamber" or section, directed by a chief justice in charge of dispatching the class action cases to all the judges of the Superior Court (and several Quebec judges based outside Montreal also handle class action work). This section is a relatively new creation (from 2005) and is in charge of organizing formations and training judges about class actions. There is no similar system of specialised class action section or chamber in Vancouver and class action cases are dispatched by Chief Justice Bauman.

When a Montreal class action is filed, it is immediately transferred to the judge in charge of the class action chamber. This judge reviews the case, contacts the lawyers involved, and dispatches the case to another judge after having on occasion discussed the substance of the case and/or management issues. Accordingly, one difference with the other jurisdictions studied is that Quebec class action files will presumably have been reviewed by at least two judges (and could be reviewed by others in the eventuality of a "conférence de règlement à l'amiable", a practice of mediation that is very prevalent and popular in the province, and that serves to help the parties conclude the settlement more effectively with the help of a mediator judge.

The Ontario Superior Court of Justice is organized differently. Because there are more than ninety judges, the Court is organised into specialty teams. There is a class actions team, comprised of approximately four

specialized judges in Toronto at all times, and several others located outside of Toronto for the rest of Ontario (in London, Ontario, notably). The judges on the team generally change every few years, while some stay on for longer terms. In Toronto, the class action team was created at the suggestion of now Chief Justice of Ontario Warren Winkler.

The U.S. federal courts, by contrast, do not have specialized class action judges. There are two ways for judges to be assigned a class action case, as described by the federal judge interviewed:

> There's really two major ways now that you get class actions. Let me talk about our general random selection process. The principle now throughout the United States is that within any given district, that lawsuits should be randomly distributed to judges, so that litigants and lawyers aren't concerned that somehow a judge was chosen for a case because of his or her views. It used to be, … there was a principle that had been adopted by the judicial conference that called upon distributing cases in a way that would get them done most efficiently, … the conference adopted the random selection proposal which is a policy matter now. So within any given district, you get a lawsuit simply because it's computer-assigned to you. That's part one. Part two is that we do have the multidistrict

litigation panel that I'm sure you know about where cases are filed in different districts around the country and then a lawyer can request that they all be centralised in one district. That's a motion that goes before the multidistrict panel. That panel then decides whether to grant the motion and also decides to what judge they will go. So, for example, I will from time to time get a call from the chair of the multidistrict panel saying, "would you be willing to take this group of cases, do you have recusal issues in your dockets, so you can handle it", and if so, if I agree and if the chief judge in this district agrees, then they would send that group of cases. So that's how most judges get the huge class action cases, that's how I've had a number of ones that I've dealt with. So the more run-of-the-mill cases class actions, small ones that don't involve many districts, come randomly; the others are sent through the screening panel that chooses judges. If you go back 20 years, it was a fairly limited group; they went pretty much to Philadelphia, Chicago, San Francisco, New York, some districts that everybody knew about. But then, about a dozen years ago, they made a conscious

> effort to broaden that because they realised that, one, that wasn't fair, two, transportation is such that there's no reason to limit it there, and three, they need more resources and have more judges that were used to and capable of handling those big MDL proceedings.
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> […] So in terms of proportion of cases, at any given time it's a handful, less then a dozen. In terms of the time assignment, of course it's much larger because they are complicated cases. In terms of the caseload, it's a small percentage for most judges. We don't have specialized class action judges in this country.[893]

Accordingly, the jurisdictions I have chosen for this study have different court organizations and some have specialized judges while others do not. These differences play out on my interviewee judges' experience, training, and therefore opinions about class action settlement practices, as I will further explain below.

b. Class Action Settlement Processes

i. Review of the Applicable Law

As further explained above in Chapter I, settlement fairness is formally evaluated at the occasion of at least one hearing, called the fairness hearing. In the U.S., this hearing occurs at two different stages: one

[893] Interview No. 1.

preliminary hearing at which the fairness is preliminarily evaluated, and where the opportunity of having a notice of settlement is considered, and one formal fairness hearing. In Canada, practices vary regarding the need for one of two hearings, and the form which these hearings will take. When a preliminary hearing is held, red flags, or areas of concern may be highlighted, and the issuance of notice is addressed.

The evidence and materials supporting the proposed settlement relate to the demonstration of fairness, reasonableness and adequacy of settlement. The settling parties carry this burden of proof, which translates into a positive obligation to provide "full and frank disclosure of all material information to the court."[894] Since there are no specifications in the caselaw or statutes about the precise extent and nature of the required disclosure, I suggested that parties probably need to disclose the contents of their negotiations, and any and all elements that do not appear from the settlement documents. The evidence required should be "sufficient", but what does that mean? I indicated that sufficient evidence includes oral and physical evidence, comprised of testimonies and supporting documents and affidavits. Of course, the parties are required to present to the judge a joint stipulation of settlement, which outlines the terms, amounts and form of compensation and effective date of settlement, as well as affidavit evidence explaining the reasons for settlement.

In principle, the courts consider the opinion of class members concerning the terms and substance of the proposed settlement. I will wonder whether these members have properly consented to the settlement outcome. American courts have considered a small number of objectors to be a significant indicator of fairness. Canadian courts, by contrast, have

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[894] See *McCarthy*, *supra* note 143 at paras. 19-21.

considered the presence, or lack of objectors to be merely one of the relevant factors of fairness.

ii. The Hearings

The judges interviewed have differing practices of approval. I have noted, however, that the Ontario and U.S. federal court judges interviewed review and approve class settlements following a process that is more structured and constistent than the process followed by Quebec and British Columbia judges.

In British Columbia, judicial practices regarding approvals of proposed settlements are simple and unregulated. Once a class action case is assigned to a judge, a case management conference is held. Since the law does not require judges to approve pre-certification settlements, judges are only seized of a class action case when an application to certify is filed. There may be joint applications to certify and settle a case, at which point the judges will hear the motion and evaluate the standards for certification and for settlement fairness.

As for hearings held to evaluate fairness, there may be one or two, and they may take the form of conferences, meetings, or hearings in chambers:

> […] it could be any number of hearings. But when it comes right down to it, often it is essentially one main hearing where the certification and the settlement [are] dealt with together, and it's at those hearings where you analyse the settlement in terms of those cases that you talked about. And sometimes there's no objector

> there and it's the job of the court to scrutinise it to make sure that this isn't just a cosy settlement.[895]

Prior to the settlement hearing, the B.C. judges explained that the general practice is that they receive voluminous documents and affidavits supporting the proposed settlement, which include information regarding the negotiations and tend to verify, support or legitimise the discussions which have gone on. At the hearing, lawyers are heard about the proposed settlement's fairness, and submissions may also be made by objectors. As for the possibility of hearing witnesses, which will be further addressed in the next subsection, it is interesting to note that the B.C. judges interviewed will generally only hear lawyers and not the class representatives.

One judge described the process as follows:

> Generally speaking, what happens is I get a binder of material. So there would be affidavits, there would be the pleadings, there would be, with any luck, the reasons from the judge in the other province, they'd be submissions, and I would go through it and weigh in my mind: am I happy with this? Are there areas where I think that maybe there should be more information provided to satisfy me that this truly is a fair result? […] So I would review the materials before the hearing,

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[895] Interview No. 17.

> with any luck, and then, by the time I get to the hearing I'll know what concerns I have so that I can raise them with counsel at the hearing. […] Sometimes I might just receive it that morning, the morning of the applications I might get the materials, in which case there's no real opportunity to have reviewed them in advance. […] If I have any questions [at the hearing], I would ask them. But I wouldn't necessarily have any questions.[896]

I interviewed a small sample of judges from British Columbia courts, but these judges described a practice that appears to be less structured than the practice of judges in other provinces. B.C. judges have no standardised system or process for the approval of proposed class action settlements. Most judges appear to follow what counsel suggest. There may or may not be more than one occasion where the fairness of settlement is discussed, and there may or may not be any witnesses – although the tendency is to rarely have objections and witnesses. B.C. judges will generally receive the documents before the approval hearing, review them, hold the hearing and decide shortly thereafter. For them, the most important element of the process appears to be the oral representations by counsel.

In Ontario, settlements are generally brought forward directly to the case manager judge who will also become the settlement judge. A settlement hearing date is fixed. Afterwards, two hearings will typically be held to evaluate the fairness of settlement – if not more. The judge will be

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[896] Interview No. 12.

requested to hold a settlement conference or pre settlement approval conference which aims to present the first draft of the settlement to the judge, address problematic issues within the agreement, verify notice issues, get feedback, and the whole without seeking a formal approval just yet:

> […] they come and say that they more or less settled and they have some discussions with me, pre-settlement approval conferences and in those pre-settlement approval conferences, I can't approve or disapprove the settlement but there is some effort to determine whether the court might have some problems that are immediately apparent on the surface of the settlement and since they haven't finalised the settlement, they may go out and address those things. So *it's a somewhat awkward process because they call it a preapproval conference but you cannot preapprove, but they're attempting to get some read about whether there are things that they could tend to*. It's also in that context where there are possibly some discussions about the notice that's going to go out to the class members describing a settlement. […] I don't preapprove and then we roll into the settlement approval hearing. As a part of the preapproval process, as I say, I

> will usually get the settlement agreement. As part of the settlement approval process, I will get a series of affidavits from class counsel and from the representative plaintiff and sometimes from claim's administrators and plan distributors and experts about notice programs and that sort of stuff.[897] [italics added]

Another judge described the pre-approval stage as one which was reserved to cases in which counsel were more sophisticated, and it would serve as an occasion to ask questions, and give leads to settling parties about ways to improve the agreement such that it later will be approved:

> I always did it in court. They would come in. They'd filed a whole bunch of material before and you immediately think about it, you get the background. It gives you the opportunity to ask questions, make sure you're understanding things, raise questions, say, "how come you haven't addressed this? Is there something I need to know?" Or, "gee, I don't think I could consider approving this unless I was given more information" or "I feel

[897] Interview No. 10. Also see Interview No. 8.

> uncomfortable about the notice", or "I feel uncomfortable with this".[898]

Accordingly, Ontario judges typically hold two hearings to evaluate the fairness of a proposed settlement. Once the preliminary hearing has been held and judges have heard counsel's arguments and asked all their questions, counsel and settling parties will know how the judge is going to decide. For several judges, the final hearing is a mere formality, at which point "you haven't made up your mind, but there's not many surprises, you know? There's not many surprises."[899] Indeed, these judges will essentially already have decided the settlement's fairness by the time they get to the fairness hearing, such that this second hearing loses all purpose:

> I've never rejected a settlement so far, so by the time I've read the material, it's not a lengthy hearing. I don't know how my colleagues handle it, but I usually or quite frequently leave the lawyers pregnant with argument because I don't need to hear it. They just repeat what they said in their factums, and since there's nobody on the other side to engage them, it's all quite boring, frankly. [900]

The judge is then left in a situation where it is difficult to decide against approval:

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[898] Interview No. 8.

[899] Interview No. 7.

[900] Interview No. 10.

> […] by the time you get to the settlement hearing, any wrinkles in it have kind of been ironed out. […] by the time I actually hear the request for settlement approval, we've had several dress rehearsals, you could say, and I think they can be fairly certain I'm going to approve it.
>
> […]
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> So that by the time it came on for hearing, the way I did it, maybe not the way other judges have done it, it'd been massaged to a point in time where I […] would just do a short endorsement on the record: "I'm satisfied that the requirements for settlement approval have been met for the case" and just sign the order.[901]

In these situations, as will be further discussed below, it does not appear efficacious or efficient to have two hearings to evaluate fairness. Of course there are other judges who use the subsequent hearing as one more occasion to fully evaluate fairness, ask questions, challenge the proposed agreement and decide whether to approve it or not:

> […], the approval hearing is not always just: "it's approved and here are the reasons" or "it's not approved and here are the reasons". I think you can, if there

[901] Interview No. 11.

> are certain areas, you can open it up. I mean, I've had situations where the documentation or some of the documentation is shockingly poor. You know, I think people are at the end of their rope and people are releasing stuff they can't possibly release, they've got stuff put in the orders. You look at it and say, "I can't do this". […] I would sort of say, "this is unacceptable. Go back. I can't approve it, but I could if". And at that point, you get the sense that some counsel are worn down, they just want out of these at that point. You know, they're done.[…] They're just trying to get approved and they're trying to get their fees.[902]

For another Ontario judge, more flexibility is required. For him, fairness of settlement can be evaluated at the occasion of several conferences, or at the occasion of a first, fairness hearing, and a following confirmation conference. The final decision to approve may then be made earlier, or at the course of conferences, correspondence or meetings.[903] Among the judges interviewed who held more than one hearing, one judge mentioned the importance of taking a pause in fairness hearings –sometimes even overnight –to generate questioning:

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[902] Interview No. 8.

[903] Interview No. 8.

> The other thing about settlement hearings, mine were always at least a day and often two days, and I'd often have a break in them.
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> […] A break scheduled in advance, so there could be reflection. And I'd reserve. But I'd have a second day staged later so that I could come up with more questions if I wanted.[904]

In Quebec, practices appear to be less structured than Ontario's regarding settlement evaluation and approval. The judges interviewed had no firm opinion about whether there needs to be one or two hearings, and about the specific procedure required to evaluate fairness. One Quebec judge was more specific about the process he follows to evaluates fairness. He explained that most of the legwork, exchange of evidence and questioning happens before the hearing, to allow him to fully understand the settlement before the formal hearing:

> First, I ask to consult the complete, final version of the settlement agreement, with all the appendices. Often, I will hold conferences, telephone conferences mostly, preparatory conferences to be able to ask questions and get a better idea of the settlement and its reach. This is important to me because I want to understand all of the settlement's

[904] Interview No. 7.

provisions before I get to the fairness hearing. This will often open up a new debate about what will happen before the hearing, what proof of settlement fairness is required. […] At these settlement conferences, we will discuss the evidence they wish to present, and what I think of it, and I will suggest additions to their evidence. I question more and more what measures of communication to class members have been chosen, what communications have been made already regarding the case, how many people appeared interested or signed up to a list of members […], did many people manifest themselves, how many are identifiable, and I try to get a better idea of who the group will be to have a better idea of the evidence that they will want to bring forward. Accordingly, there is much more evidence required before the hearing itself. And, when we will get to the hearing, I will already have agreed with the lawyers about the evidence required, the focus of the oral presentations, and of what will then give me a better idea of what the settlement is about, and to be

> able to find out whether it is fair and reasonable for class members.[905]

This judge also indicated that he may on occasion ask the parties to work harder on the proposed settlement at the pre-approval stage, such as to ensure that the settlement is later approved.[906] As for the settlement hearing, he explains that questions may then be asked, and he cautions that

> I make sure [, at the hearing,] not to have held in previous pre-approval conferences, the debate that must be held in court. This debate must be had. What I try to do in preparatory conferences is tell the parties: "get ready, I want this and that [evidence] such that I am able at the hearing to ask further questions about the proposed settlement and bring the settlement to closure, having looked at all the issues. […] That is why our settlement hearings have gotten longer than they used to be. But it all depends on the complexity of the debate.[907]

The other Quebec judges were not as specific regarding the process they follow to evaluate and approve class action settlements.

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[905] Interview No. 4.

[906] Interview No. 4. ("I told them, 'listen, I am not satisfied. You will work harder and add or change this and that information /these elements.' And they did it! They did the extra work. I was reassured.")

[907] Interview No. 4.

U.S. federal court practices regarding the procedure of approval appear to be, similar to Ontario's, more structured. The U.S. federal judge I interviewed aptly summarized the practice followed by fellow judges:

> […] the first hearing is nothing but a screen; it's whether there's enough here to justify the expenditure of notice to go out to the class, or whether it's so bad from the beginning that I'm not even gonna justify it with that. The real hearing is the second, the fairness hearing where the objectors come in and where we have the substantive understanding of what takes place. But that first stage is just because we have to give notice if it's a 43.b.3 class, and since notice is inevitably expensive, then we have to have some confidence that it's justified.[908]

In sum, the majority of the judges interviewed from all the jurisdictions appear to prefer to evaluate fairness at more than one occasion, whether these occasions are formal hearings or not. They want to be in possession of the settlement documents (including affidavits and appendices) as soon as possible after conclusion of the agreement. Once they have the documents, many judges will not hesitate to ask questions about it, and these questions will preferably be asked at the occasion of telephone conferences or pre-approval conferences. Since there are no parties at

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[908] Interview No. 1.

these pre-approval discussions, the lawyers will be invited to be as candid and honest as possible regarding the proposed agreement.

During the interviews, some of the judges interviewed did not respond clearly or directly when asked which process they follow. They either changed the subject, or responded vaguely that the fairness hearing is important for them, that they want to understand the "deal", that they think holding two hearings would be a good idea. Several judges also clearly responded in ways that made me believe that they use the second hearing as an excuse to approve the settlement officially, as they will already have, informally approved the deal at an earlier communication with counsel.

The responses varied from jurisdiction to jurisdiction, but may be grouped in two categories. The Ontario and the U.S. federal judges, on the one side, appear more determined and structured regarding the two-staged fairness determination, and the objectives of these hearings. These judges believe that there must be a preliminary hearing, intended to gain a solid understanding of the proposed agreement and start discussing the parties' evidence of fairness, and a final fairness hearing, intended to formally and finally adjudicate the fairness of settlement. What is problematic in these jurisdictions' process and method is that the judge becomes so involved in the development of the evidence required to support approval that it may become difficult for him to decide against fairness at the final hearing.

On the contrary, judicial practices in Quebec and British Columbia are much less structured and judges are more flexible regarding the ideal time and place of the fairness determination. They will evaluate fairness at the occasion of at least one hearing, and will sometimes also discuss fairness issues before the fairness hearing. The objectives of the hearing essentially

focus on understanding the agreement and evaluating fairness, but if there are two or more hearings, the particularities of these hearings' objectives remain unclear.

Of course, these situations are very complex or multivariate and without more data, I cannot tell with certainty what is really going on or how there may be varying practices among the rest of the judges.

iii. Experts, Witnesses and Oral Arguments

The interviews conducted revealed that in the experience of most of the judges interviewed, fairness hearings essentially group together the lawyers for the plaintiffs and defendants, the judge, and on occasion a passive representative. In all the jurisdictions, the lawyers on both sides file affidavits explaining their respective reasons for supporting the agreement, and the representative will also sign one of them. These lawyers will generally present their arguments orally as well, an exercise that some judges find duplicative and useless. Experts are used, but only occasionally, in complex cases such as those in the pharmaceutical field. The judges interviewed explained that they rarely hear from the representative directly, and that when they do, this testimony will most often passively confirm the contents of his or her affidavit. No other witnesses are generally heard at this occasion other than the objectors, if any.

In British Columbia, none of the judges interviewed indicated having ever spoken to the representative or any of the parties. One judge explained "I don't think I've ever had any of the plaintiffs before me. I can't remember ever having actually had people in front of me other than counsel."[909]

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[909] Interview No. 16.

Another explained that in one particular case, he heard the opinion of class members through written submissions:

> In that particular case, I had letters from a number of people who were either the representative themselves, the representative plaintiff making statements, others who are independent of the representative plaintiff who were saying that "we agree with this", and I had one or two that were naysayers, saying that "this isn't enough, this doesn't adequately compensate us for the grief and misery and aggravation that we're endured as a result of somebody's wrongdoing". So there was quite a variety of submissions, yes.[910]

The B.C. judges interviewed also appeared reluctant to the possibility of having experts testify at the hearing. One judge explained: "The court is really the agency that ultimately is responsible for assessing the fairness. The lawyers would object to that and the courts would object to that. We don't want to be told by accountants what's fair and reasonable."[911]

The situation appears to be somewhat similar in Ontario, where the judges interviewed indicated that they do not meet, hear or talk to the class representative. One judge summarized the lack of implication of the class representative as follows: "Q: So do you ever speak to the representative?

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[910] Interview No. 13.

[911] Interview No. 13.

R: No, the representative plaintiff inevitably files an affidavit saying that they think the settlement is great and they think that the class counsel fee is great and everything is great."[912] Another judge explained, in similar words:

> The representative doesn't even come. There's usually an affidavit of the representative plaintiff saying that they approve, that the settlement has been explained to them and they approve of it, or in the case that I mentioned, that they've received independent legal advice and they're satisfied that the settlement is fair and reasonable to everyone.[913]

In the words of another,

> [Representative plaintiffs] usually put in an affidavit saying, "I agree". They always do that on the fees too, but they do it on the settlement. The representative plaintiff is putting it forward, recommending it. So even though in substance it's the lawyers, normally the plaintiff's lawyer does it. And a few have spoken. I wouldn't say it's general. It's often just the affidavit.

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[912] Interview No. 10.

[913] Interview No. 11.

> The typical settlement conference, it's all lawyers and you.[914]

When asked whether they would value hearing from the class action representative, the Ontario judges interviewed responded favourably, indicating that they thought it would be very helpful. One judge mentioned that he had heard the testimony of a class action representative once, and that this testimony gave him a lot of confidence in approving the settlement:

> [The representatives are] invariably present. Some of them are excellent people. For example, there's one [case where] the plaintiff was highly educated, very much on the ball, very much involved in everything and when she stood up and said to me, "I think this is a fair and reasonable settlement", it gave me a lot of encouragement. It gave me more encouragement when she said, "and I think this fee is fair and reasonable because my lawyers worked hard and they were always available and so on and so on". She was a businesswoman […] It doesn't happen very often. More often than not, the representative plaintiff hasn't got a clue whether the settlement is reasonable or whether the fee is

[914] Interview No. 7.

> reasonable. I asked a representative plaintiff quite recently, "you swore an affidavit in which you said this fee is reasonable. Do you really think that?" And he said, "well, I wouldn't know, would I". I think that's more likely to be the experience.[915]

This latter comment is interesting because it highlights the difficulties that judges generally have with the role and involvement of the class action representatives. The majority of the judges interviewed indicated how tremendously passive the representatives are, how rare their testimonies are and when they testify, how unreliable this testimony really is. The latter comment suggests that representatives who sign affidavits supporting the proposed settlement often do not know or properly understand what they are signing.

One way to palliate this disconnect between the contents of the affidavits that representatives sign and their true understanding of the case and settlement is to seek to hear or examine them, asking them to explain why they believe this is a good settlement. Judges, however, do not seem to get "very far" when they do so, and instead end up relying upon the opinion of counsel:

> […] you don't get very far. I had one where there were a lot of objectors and the plaintiff was a nice, nice man […] and he recommended the settlement reluctantly and then all these objectors stood up and

[915] Interview No. 9.

> moaned about the settlement and so on and he was almost in tears.[916]

While they remain open to the possibility of having experts testify at the fairness hearing, none of Ontario judges interviewed ever felt the necessity of doing so in their practices. My understanding, notably from the following extracts of two different interviews, is that they feel that they already have lots of materials at hand to review, such that they would feel overwhelmed with more evidence. As one judge explained:

> The settlement materials can be voluminous. Voluminous. And since at that point it's agreed there's not cross examinations, it's just the affidavit materials, it's really more a question, in the case of the objectors, they're making oral submissions to the court. *So I can't think of a scenario where I have said that I wanted to hear from an expert or do something. But you know what? You could. You know, if there was a particular area that was troubling and if you couldn't understand it and you wanted something, it's open to you*, you can say, "I'd like to hear from the expert, Mister X; could you make him available? You can ask him some questions and I'll ask him some questions". So one of the fun things about

[916] Interview No. 9.

> being a judge in this area is that it's increasingly developed. Because it was so open, I think it was open to you to be creative and to figure it out and understand it. And some of these class actions are very complicated, and so to settle it and to approve it, you need to understand the stuff.[917] [italics added]

Another judge indicated that he felt that once

> you have the evidence of one side and you have the evidence of another side and you have a settlement, at that point in time I guess I don't think I would feel the need to have an independent expert if I was satisfied it was an arm's length settlement, that class counsel was truly in it to get the best settlement possible, arm's length, etc., […] I don't think I would need it.[918]

While they answered against the suggestion of having or welcoming experts regarding fairness of settlement, the Ontario judges I interviewed all viewed the idea of the court monitor or court counsel positively, as will be further discussed below in the next subsection. I explain the judges' resistance to outside experts principally by their concern with costs and indeterminacy as to who would pay these expert fees.

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[917] Interview No. 8.

[918] Interview No. 8.

The Quebec judges I interviewed, by contrast, were all in favour of hearing class representatives, and generally welcome expert testimony at the fairness hearing, but only to explain complex pharmaceutical, financial or corporate questions, as opposed to testifying about the fairness of settlement. In fact, witnesses generally appear to be heard increasingly more often in Quebec:

> […] we used to not hear any witness, and that has changed as it is now frequent for us to hear witnesses, representatives, or other witnesses who are specialists and experts who will come, especially in pharmaceutical cases where we need to understand the medication better.[919]

For another, experienced Quebec judge, the only witness that will be heard at the fairness hearing is the class representative, and only "sometimes, but not always".[920] Nonetheless, this judge believes that we should probably systematically hear the representative.[921]

As for the other, unnamed or absent class members, they are "rarely" heard, in Quebec, unless they come to the hearing and ask to testify as they oppose the proposed settlement.[922] In certain highly specific and sensitive cases, such as personal injury or tort cases, class members may

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[919] Interview No. 4.

[920] Interview No. 5.

[921] Interview No. 5.

[922] Interview No. 4.

testify to obtain closure about their case.[923] One judge interestingly suggested that class members systematically be heard relative to the fairness of settlement, at the judge's surprise request:

> R. I want to have […] a satisfactory evidence of the settlement, one that explains the settlement to me. The required evidence of settlement fairness depends on my appreciation of the case, the evidence that given my understanding of the deal, that the reasonable class member will be satisfied with that. I could hear the representative about that – and this would be satisfactory evidence. I could even hear other representatives or class members. Imagine that there are 20 000 class members, imagine that we can find 10 members who can come speak about the settlement independently […]
>
> Q. We would have to tell the lawyer "when you come to the fairness hearing, you must bring someone [a class member] with you."
>
> R. Yes, "someone you have not met or prepped beforehand" […] I do not know

[923] Interview No. 3.

> of any case where that has been done. […][but] it is doable. Absolutely.[924]

Another judge's position contrasted with his Quebec colleagues as he explained his reluctance to having experts testify about the fairness of settlement:

> R: I think experts place the judge in an extremely difficult situation because, on the one hand, what are the cases in which we should require them, and we often say "yes, if I give you the power to do it, you will use it." We must be careful with that. Once you give a power to a judge, you must justify not using it. So I find it difficult, when you are about to approve a settlement, to say "there will be this one expert who can tell me more about it". To put it differently, I will instead ask all the parties in front of me to demonstrate the fairness and reasonableness of this problematic aspect of it, and if they don't do it, I will refuse to approve the agreement. *But I do not want to have my role transformed into a role that is so large that people accuse me of not using it*.[925] [italics added]

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[924] Interview No. 6.

[925] Interview No. 4.

Finally, in the U.S. federal courts, lawyers occupy most of the place in the courtroom, but judicial practice welcomes both representatives and expert witnesses:

> R: Yes, particularly if they want some kind of an incentive award. So they may come in and talk about how the deposition took their time, or how they had to suffer embarrassment in the news media by virtue of taking the role they took. *But for the most part, it's the lawyers, as you know. The representative plaintiffs in most cases are not the active clients they would be in a regular civil lawsuit*.[926] [italics added]
>
> […] Oftentimes, in big cases I'll have economists who will be testifying and valuing what the recovery might be […]
>
> Q. You mentioned experts. *Experts are allowed and encouraged in certain cases, then.*
>
> *R: Right.* For example, in an antitrust or competition case, there will have been experts from the beginning trying to evaluate the damages, the amount of damages, etc., and so you will expect that to be available in connection with the total settlement that's presented to you, and

[926] Interview No. 1.

> obviously, in terms of administering the settlement, *you're gonna need a claim's administrator, you're gonna need a publication plan, and so typically there are experts who come forward on those items. You may have lawyers being proffered as experts in terms of the value of the case for the risks, things of that sort.*[927] [italics added]

When asked whether the practice of hearing the representative should be made systematic, the U.S. federal court judge interviewed wondered whether that testimony would really be useful:

> Whether they'd have anything useful to offer is an interesting question. I suppose it depends on the nature of the suit; if it's a complicated antitrust case or what you call a competition case, they may really not be able to explain very much. If it's a strict search case, then, sure, they can talk about the humiliation they went through; if it's an identity theft case, they can talk about their emotional concerns about the future, what might happen to their credit. So I guess it would vary with the case.[928]

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[927] Interview No. 1.

[928] Interview No. 1.

In sum, while the judges interviewed appear to appreciate other opinions about settlement fairness, they generally do not feel the need to have independent experts or the representative testify at the hearing.

iv. Court Monitor or Counsel for the Court

Related to the topic of experts is the judicial practice in some jurisdictions of using a court monitor or counsel or lawyer for the court. While several Canadian judges have felt comfortable, in their practice, asking an outside lawyer to counsel them regarding the settlement, opinions are divided as to the usefulness and appropriateness of the practice. Indeed, some judges indicate that the monitor is helpful to break the isolation they feel, and to palliate the difficulties felt throughout this non-adversarial process. In the end, the interviews have shown that there is no consensus on the true extent of this monitor's role, responsibility and duties.

I have found that the monitor appears to be mostly used and welcomed, in Canada, in multi-jurisdictional cases where help is needed with the claims administration. The parties will pay for his or her fees as these monies will come out of the settlement funds.

Ontario Chief Justice Winkler appears to have been the first Canadian judge to use the services of such as monitor.[929] In Quebec, however, the idea of monitor is not received favourably by civil law trained judges.[930]

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[929] As one judge explained : « […] that was an idea that originated with now Chief Justice Winkler in Ontario who said that, "if we're gonna be saddled with the administrative outfall from these settlements, we can't do it without assistance and therefore you're gonna have to agree that the appointment of a monitor will be funded […]I don't know out of what funds he's being paid; I don't know whether the Ontario court has set aside a sum to pay him. I don't know." See e.g. Interview No. 13.

[930] I say this based on the impression I got from interviewing civil law trained judges and common law trained judges serving in Quebec. However, I cannot further detail this proposal as this would permit judges to be identified.

It is important to understand the judges' perception of the role that the monitor currently has and may eventually have. Interestingly, some judges consider the monitor as a true "counsel" for the court, while others refer to him as a "liaison". Others, yet again, feel that his presence and services are unnecessary, mostly because, they argue, having someone counsel the court would usurpate the court's adjudicatory functions.

One judge described the extent of the monitor's involvement in one of the large class action cases in Canada, and described him as an "interface" or "liaison" between the different judges of each of the provinces involved in the multi-jurisdictional settlement:

> […] The settlement provided for the creation of a joint committee and the joint committee was comprised of essentially class action counsel in Ontario, Quebec and British Columbia, and they were to act like a board of directors to supervise the administration of the settlement, because the complexity of that settlement is really quite overwhelming and I think there was a concern that there may be administrative issues, as indeed there were, that people couldn't anticipate when they put the agreement together, and as a result *he was there to provide the interface between the courts, the judges of the three courts, and the joint committee*, and if we had concerns about what was being paid to administer the fund, or how the

> claims were being processed, or the appointment of the administrators, […] So he's really the chief executive officer, if you like, and the three judges are our board of directors. He will tell us of problems, we'll try to resolve the problems and we'll consult, advise him of our collective view and he'll try to work it out with the joint committee. […] It's at the implementation stage. He's not involved at all in deciding whether the settlement is good, bad or indifferent. It's purely running the mechanics of the process and working out the volume of problems, which have declined somewhat but nonetheless they're numerous, relating to the administration of the fund.[931]

Another judge explained the monitor's role as one of "oversight", of information, and of administration:

> [...] he acts for us and he's kind of the liaison guy. He makes sure that everything is being done according to the agreements that have been reached and *it's a method, I think, of providing us with a kind of oversight, what's happening with that settlement, is it going to court, are they doing*

[931] Interview No. 13.

> *what they're supposed to do*, is the arbitration process working the way it was supposed to work, in some of these cases where there's a long workout period envisaged.
>
> Q: So is he an administrator, or a counsel.
>
> R: Well, he's a combination in a way, and he provides the oversight for the judges. It keeps us informed. If something goes wrong or there's something that's not working, we learn about it very quickly.[932] [italics added]

This same judge interestingly characterized the judges as this monitor's "clients":

> R. […] he gets his mandate from the judges, with the blessing of the parties because when we ask for this kind of counsel, what we're really saying is "we want him to be our representative overseeing this settlement. We don't want to approve something and then just walk away from it"
>
> […]what we've done in these cases really is we said to the parties, "we're not gonna

[932] Interview No. 2.

> approve your settlement until you agree to appoint somebody, you allow us to appoint an overseer, whose fees are going to be paid by". It can be rough.
>
> Q: So his clients are the judges.
>
> R: Are the judges, yes, in the different jurisdictions. That's who he reports to. Nobody else. He doesn't report to Canada, he doesn't report to either of the parties. Just to the judges.[933]

Other judges implicitly suggested that the monitor described above should be appointed only on a case by case basis, and should have a limited role:

> Q. I'm told [the monitor is] the lawyer for the court.
>
> R: He's not. He's definitely not the lawyer for…[…] he has no official role at all. […] when I talk about retaining independent counsel, it's not one individual. I'm thinking that it could be any number of people who would agree to take on a retainer for a particular case. But I haven't thought that through enough and I never did it. But as I said, [I believe that we should ask] the defendants to pay for that

[933] Interview No. 2.

> since they're not in a position to stand up and say why they think the settlement is good or bad.[934]

When asked specifically whether the monitor could advise the courts on fairness of settlement issues, two judges responded: "[n]o, that's a judicial function"[935], and "[one that] goes against the role of the judge because it seems like you're deferring to that person, especially if you agree with them, then you've abdicated. So you'd have to get over that. "[936] One judge in particular had a bad experience with using monitors or "friends of the court", and was disappointed to find, more than ounce, that this friend had "other friends":

> […] in *some cases I've appointed an independent lawyer as a friend of the court and […] I've generally found that I'm not their only friend*. I'm quite sure that counsel put a lot of pressure on them, not necessarily in any reprehensible way but I'm quite sure they do. Counsel's got big fees at stake. If you've got a fee of 12 million dollars on the table, chances are you're not going to be too receptive to some other lawyer coming in and trying to second guess you. I've had more success with people from one of the

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[934] Interview No. 11.

[935] Interview No. 13.

[936] Interview No. 7.

> government offices, like the Public Guardian and Trustee of the Children's lawyer. The Public Guardian and Trustee, their lawyers generally are quite accustomed to taking on lawyers in private practice and they're not intimidated.[937] [italics added]

In B.C., most of the judges interviewed had never dealt with a court monitor, but they generally felt comfortable with the idea of having another external opinion of fairness, and more so than the Quebec judges, for instance:

> If you could have somebody like a monitor who was an officer of the court and whose role was to be independent of the parties, that would be ideal. That's sort of like what we have in insolvency, Companies' Creditors Arrangement Act proceedings, where you have somebody who is actually intimately involved and yet isn't one of the parties, who can say, "I've looked at this, my concerns are this". Then that's very helpful. I think that would be ideal. But whether that could be brought into play in this sort of a

[937] Interview No. 9.

> situation, I don't know. But it certainly would be an ideal thing.[938]
>
> […] if somebody would say, "well, there are people out there that have suffered this kind of harm", my concern is, well, I don't really have evidence of that; but I'm hearing these rumblings, so it's making me uneasy, approving this settlement. Then I could say to a monitor, if I didn't feel comfortable with the lawyers getting the information, "I want you to go and write the potential class members and find out if we have this problem". I think that sounds like actually quite a good idea. I mean, it's just another way of getting the information together to get the facts. I mean, it's easy at the end of the trial when you've got all the evidence in. So what we're doing is we're trying to go, okay, let's see if we can do that without this whole trial, because we know we can get the information that way. How are we

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[938] Interview No. 12. Another judge welcomed the idea of an outside opinion of fairness, but only relative to counsel fees in the context of settlement approval: " […] because the defendants are gagged and they don't say anything, I would retain independent counsel to assist the court with that aspect of the approval, because we're just not equipped to go through mounds of dockets and know whether the fees that are being requested are fair and reasonable." See Interview No. 11. Another judge explained that he would agree to having a monitor, even though he has not yet felt the need for it: "I don't see why you couldn't. I think you'd have to explore, you'd have to say to counsel, "I have difficulty with this", and you have to figure out why you think you need it, what you need that can't be satisfied in some other way and who should bear the cost." See Interview No. 8.

> going to get that information now? And the lawyers say, "well, here's the evidence", but there's this big gap. I think it sounds like a good idea. It sounds like it could be, in the appropriate case, the right thing. These things cost money. You gotta get somebody to pay for the monitor.[939]

In the U.S. federal courts, the judge interviewed explained that courts only refer to monitors or "special masters" exceptionally:

> […] there certainly have been cases, the huge cases where judges in this country on MDL cases have appointed a law professor or somebody else to be a special master and to manage the distribution of settlement. That's become a skill, an expertise of a handful of people around the country to do that. But I would say *that's an exception. The reason it's an exception, I think most of us are reluctant to engage still another person who's gonna cost more money that thereby won't go to the class, and that's what it would involve because it's a huge undertaking but I know I share the desire of many of your judges to be able to assign that to somebody else to take care of or to have somebody else to consult on it*. […]I think

[939] Interview No. 17.

> you have to ask what expertise is that person going to bring that the judge doesn't already have or can't get from individualised experts. Certainly I can see in some cases appointing a special master, […] But it's expensive. I think we're reluctant to simply appoint people to do that. I wish that down here […] there was more of a budget in our administrative agencies to be available to a judge to appear as an *amicus*.[940] [italics added]

More generally, I had the impression from the interviews that the judicial attitude toward the presence and use of court monitors depended upon their openness to having a third party comment on – or evaluate –the fairness of the proposed settlement. In the course of the interviews, and as I will further address in my analysis of the data, judges spoke about how isolated they felt in the whole process of approval.[941] They mentioned how distressing it felt that everyone would agree to the proposed deal and that no counter arguments were presented. They explained that that they found it difficult to challenge the deal presented, mostly because they did not feel that they had all the information necessary to properly decide. They explained how comforting they thought objectors were, how they relied on the lawyers' representations of fairness, how helpful it was to have another judge's perspective in multi-jurisdictional settlements, and

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[940] Interview No. 1.

[941] See Interview No. 7: "It's a very difficult position because at that point, you're the only one who's there in the interest of the class members, who are almost entirely absent."

how they found that settlements that were concluded after having been mediated were probably fair (because another judge had his say in it).

I wanted to find out exactly how many judges were in favour of having another person evaluate the fairness of the proposed deal. Accordingly, with the use of the N'Vivo software, I launched a query about the judges' attitudes toward third party opinions about fairness. To do so, I categorized each of the interviews, based on a general reading, understanding, and impressions of it. I elaborated three categories: (1) whether the judges "welcome[d] other opinions about fairness", (2) whether they "[did] not welcome other opinions about fairness", and (3) whether they "welcome[d] other opinions but ha[d] not yet felt the need to obtain any." The result of the query is in Table III, below:

Table III: Perceptions and Acceptance of Third Party Opinions about Fairness

	Welcomes other opinions about fairness	**Does not welcome other opinions about fairness**	**Welcomes other opinions but has not felt the need…**
1 : 2009-J-CL-BC-1	0	0	1
2 : 2009-J-CL-BC-2	1	0	0
3 : 2009-J-CL-BC-3	0	1	0
4 : 2009-J-CL-BC-4	1	0	0
5 : 2009-J-CL-BC-5	0	1	0
6 : 2009-J-CL-BC-6	1	0	0
7 : 2009-J-CL-O-1	0	0	1
8 : 2009-J-CL-O-2	1	0	0
9 : 2009-J-CL-O-3	1	0	0
10 : 2009-J-CL-O-4	1	0	0
11 : 2010-J-CL-O-5	1	0	0
12 : 2009-J-CC-QC-1	0	0	1
13 : 2009-J-CC-QC-2	0	1	0

14 : 2009-J-CC-QC-3	0	1	0
15 : 2009-J-CC-QC-4	1	0	0
16 : 2009-J-CC-QC-5	1	0	0
17 : 2010-J-CL-US-1 TOTAL :	1 10	0 4	0 3

From the seventeen (17) judges interviewed, ten (10) appeared to welcome other opinions of fairness, whether it be opinions of mediators, of counsels or monitors for the court, or of other kinds of expert witnesses who would help evaluate fairness. When a judge does not welcome other opinions about fairness, it is often because he believes that the evaluation of fairness is a judicial function[942], or it transpires from the interview that he does not believe anyone else should be involved in deciding fairness and feels more comfortable with that function. As can be seen from the table, only four (4) out of the seventeen (17) judges would not welcome opinions of others about fairness. All others would embrace the help. The third category of judges interviewed who would welcome third party opinions but have not used or felt the need to refer to them is a helpful distinction because it confirms that the great majority (10) of the judges who welcome these opinions (13) have sought help from others, while 3 would like to have this help but have not yet sought any.

[942] Interview No. 13.

v. Evidence Necessary to Prove Settlement Fairness

One area of interest in the interviews was the discussion of the forms and amount of evidence that the judges interviewed require to evaluate the fairness – or unfairness – of proposed settlements. In this subsection, I therefore concentrate on the forms of evidence required, and discuss what convinces the judges of the fairness of proposed settlements.

In all the focus jurisdictions, the judges interviewed explained that they are presented with documentary materials that take the form of affidavits from counsel stating "here's the nature of the claim and here's how it arises and here's what we've done and here's what we haven't done"[943], and that "negotiations were protracted or that they were hotly argued or those sorts of general statements".[944] In Ontario, proof is "done on a paper record and sometimes that paper record is pretty voluminous, but there's no cross-examination on it or anything because nobody is really challenging it."[945] There's usually an affidavit of the representative "saying that they approve, that the settlement has been explained to them and they approve of it, or […] that they've received independent legal advice and they're satisfied that the settlement is fair and reasonable to everyone.[946] In the United States federal courts, the evidence is similarly described as requiring both oral and written pleadings, as well as elaborate documentary evidence:

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[943] Interview No. 16.

[944] Interview No. 12.

[945] Interview No. 11.

[946] Interview No. 11.

I certainly want affidavits from people on the issues for example of administration, how that's going to be done, what the coverage is going to be, whether they're using mail or web or newspaper or these days twitter or whatever it might be. I want to have affidavits from experts on that. I want lawyers' affidavits about the way they valued the settlement, about how that came to pass. It may be necessary to have economist affidavits or deposition testimony in terms of giving value to the damage claims. So the most important things will have to come in by way of affidavit or deposition. I don't think I've usually had live testimony. Certainly I've had objectors come in and speak, as we talked about before, but I don't think I've had actual live testimony. It's coming the other way. But certainly I know of cases where the objectors have requested the opportunity to take discovery and if the case is made, judges who have allowed it because they've been convinced that not enough has been revealed before and so the further discovery would be useful to explore something about the case. […]

> At the first hearing, it's simply the proponents of the settlement convincing the judge that notice should go out. [It's both] oral and affidavit [evidence].[947]

Furthermore, the majority of the judges interviewed indicated that they will not typically require additional evidence regarding settlement fairness, but that they may ask the lawyers to present arguments on more problematic issues, after having asked specific questions about these issues.[948]

In fact, the Quebec judges I interviewed appeared to have a somewhat different attitude regarding the proof of fairness. As one judge suggested: "it may be only anecdotal, but I think Quebec judges are more open to requiring additional evidence in Quebec than in other jurisdictions."[949] My perception of the interviews conducted of Quebec judges suggests that they indeed appear to be more forthcoming regarding requests for additional evidence. Quebec judges generally require the following three pieces of evidence:

> First, and generally, we hear the representative. Second, we generally have affidavits that require defendants to come testify, that will relate to a product, if we're dealing with safety or defective products. [Third,] we will often gave affidavits from the lawyer, and we often

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[947] Interview No. 1.

[948] Interview No. 4.

[949] Interview No. 6.

> ask that this lawyer explain in his affidavit what kinds and extent of communications with the potential class members. And there are certain lawyers who will sometimes feel uncomfortable with this request and say "we promise!", but we generally try to make them understand that in all appearance of fairness, we prefer that they clearly explain in an affidavit every step that they have taken to reach out to the members.[950]

But the majority of the Quebec judges interviewed importantly require a "sufficient proof [, to their satisfaction and] depending on their appreciation of the case […], that explains the settlement [, and that] the reasonable member will be satisfied with."[951] This proof will "depend on the case […] it will be [guided by] a kind of general proportionality [principle]."[952] This evidence will cover a broader array of elements than the evidence required in the common law jurisdictions:

> [The evidence will] first cover the number of members and their location, and will appropriately cover all aspects of the litigation. […] We want to understand why certain members were set aside and eliminated. So I increasingly ask that a

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[950] Interview No. 4.

[951] Interview No. 6.

[952] Interview No. 5.

> proof be made of the reasons why 50, 40 or 75% of members have been excluded. I will be very strict on that aspect because I really want to understand the reasons behind the exclusion. It will mostly be about that. And in very technical cases, I will ask for an explanation of the technical issues.[953]

Accordingly, there appears to be a tendency among the Quebec judges interviewed to be more demanding about the required weight and preciseness of the evidence of settlement fairness. The Quebec judges do not appear to be entirely satisfied, at the outset, with the evidence that they are presented with. Contrary to the common law judges I interviewed, Quebec judges will themselves decide what kind of evidence is needed, and will make sure that they require and obtain that evidence. I will address below whether this attitude is related to possibly differing roles of Quebec judges vis-à-vis their common law colleagues.

One last, related issue is the personal preference of the judges interviewed regarding details provided in a class action approval decision. The judges interviewed underlined a recent trend in judicial practices to give more details supporting the decision to approve or deny proposed settlements. One judge indicated, about that tendency, that "I think for a number of years there was not that much stuff in settlements and approvals. People tended not to write. […] I think in the last four years, at least in Toronto,

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[953] Interview No. 4.

[…] people tend to write more. [referring to judges writing more in their decisions.]"[954]

vi. The Objections

The data from the interviews conducted evidences that objections are rare, especially in British Columbia and Quebec, but that when they are made, they tend to be carefully heard by the judges and considered useful. One B.C. judge explained that he believes the objections are very valuable, in a non-adversarial context such as the settlement approval one. He explained that they are useful to bring attention to the problematic areas or provisions of the settlement, and to provide support to the judge in his decision:

> R: Oh! I think they're very valuable. Yeah, very valuable. They're often what the judge wants to be directing his or her mind to, but sometimes you don't know. You often don't know what the problems are. You can apply a test and look at it and you think, well, this looks okay to me. But unless an outsider says, "well, what about this point?" you wouldn't know to see that as a concern. So the role of objectors is invaluable, I think. And if you can hear their concerns and still be satisfied that nevertheless the settlement is good

[954] Interview No. 8.

> enough, then it gives you much more comfort.[955]

In cases where objections are made to the settlement, which admittedly are exceptional, one judge indicated having once been influenced by the objections in such a way as to thereafter suggest that the settlement be amended:

> R. I'm thinking of one particular case I had where there'd been a fair degree of communication, and at the settlement hearing you had class members who appeared and said, "not fair", or "I'm unhappy about this". And then you get the argument, "well, that's just one person" and you have to consider whether the settlement has addressed the particular… you know, what role the objections of that particular individual should have. And in one case, I required a change.
>
> Q: Because of the objections.
>
> R: Yeah. Well, I asked for more background, like, "the class has people with sort of different interests, how did you address this?" I got some information

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[955] Interview No. 17.

> and there was a modification of the settlement.[956]

Interestingly, certain judges believe that their role of protection of class action members is fulfilled through the intervention of objectors to the proposed settlement. They will thus not feel the same need to protect the members when there have been objections to the proposed settlement. Accordingly, my interpretation is that they associate the role of objectors to a role of protection of class action members:

> R: Well, because I'm trained in an adversarial system, I would always like to have someone there taking a contrary view, and so if there are not, I feel I have to make it myself. But would I appreciate it? You know, some people make submissions that are good and I appreciate those, and some people make submissions that are terrible and then I wish they hadn't, so I'm not trying to be facetious. I can imagine an objector who'd come who I might think was a bit of a prank and it didn't assist me in coming anywhere; but *I'd feel some comfort that people had been given notice and they could have come and objected. I mean, I would like to hear from an objector, but if they make an objection and it's poorly expressed, I still have*

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[956] Interview No. 8.

> *to go back and try to think about it from their perspective*.[957] [italics added]

In fact, the majority of the judges interviewed welcome objections, but some worry that they will stand in the way of the settlement's conclusion. Accordingly, on the one hand, they appear to welcome the discussion and adversariality brought by the objections, but on the other, they fear that the objections will stand in the way of peace and finality. These judges tend to focus on efficiency of the system, as will be further discussed below in Table XI.[958]

One problem that judges mentioned with evaluating the substantive importance and relevance of objections is the fact that most class members appear to have a poor understanding of the class action case or of the settlement. One judge explained that in one of his files, two class members came to the hearing, and did not know that the agreement explicitly responded to their preoccupations:

> You will understand how class members still do not understand the cases that they are involved with. The members who appeared before me told their story, and I told them "I remind you that the settlement provides for this and that thing; do you have comments to formulate regarding these provisions, on your behalf or on behalf of the other members?" The members were unable to

[957] Interview No. 14.

[958] See e.g. Interview No. 9.

> respond, they could not draw a relation between their arguments and the provisions of the agreement, and that's revealing of the complex aspects of class settlements, and of the way they are drafted. We will increasingly try to simplify the notices to class members, […] but they are hard to understand for a non-lawyer. […] what the members were trying to do before me was to prove their claims for indemnification. They did not understand what they were doing.[959]

Another judge explained that the best way to evaluate the relative importance of objections and the weight that they should be afforded is to ask:

> […] is the objection important enough to sap the whole settlement structure that has been put into place? […] Is the objectors' group different enough from the rest of the class that they could themselves form their own class action? […] if the class is well defined, the objectors will be easily situated with regards to the settlement. If the class is not well defined, sometimes you will wonder whether the objectors are right, and

[959] Interview No. 4.

> whether they truly have their place in and should really form part of the class action.[960]

He also explains more precisely how one will evaluate the weight to be given to objections, and what indicators are to be considered: "[…] some objections have a better presentation than others. On occasion, the objectors will hire a lawyer to represent them. […] Of course, when the objectors are represented by counsel, the objection is […] given more weight."[961]

One judge explained that he prefers that there be no conflict or discussion between the class members and the judge, and that the objections "go away".[962] His solution to dealing with objectors is to order a recess to the hearing and ask class counsel to discuss the settlement and objections with the objectors in a separate room:

> Again, I had a hearing, […] on the approval […] and there were a couple of [class members] who stood up and were not entirely satisfied with the agreement or didn't understand it all that well, and they got up to tell their story or their complaint. When that happened, I would usually suspend the hearing long enough for the plaintiff's class lawyer to go and talk to that woman because obviously

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[960] Interview No. 4.

[961] Interview No. 4.

[962] Interview No. 2.

> there hadn't been any chat between lawyer and client for that particular class. So you give that opportunity. You suspend for 15 minutes and let it happen and then see if there's still a problem. And usually that solved it. I wanted to avoid at all costs any possible conflict between a class member and the bench…. I wanted to make sure that the member who had taken the trouble to come down to the courtroom was going to be able to have an explanation from somebody who might become heard… and once there's approval, of course that lawyer becomes all of a sudden counsel to the class […].[963]

Finally, the U.S. federal judge I interviewed appeared to welcome objections and generally find them useful. He worries, nonetheless, about professional objectors. These objectors act because they are paid to present an argument, and their objections are interpreted as being less reliable:

> […] yes, we do get objections and objectors and the answer is sometimes they're useful and sometimes they're a nuisance and you never know which they're going to be, except that after you've done it for awhile, there are a few names that are familiar to you and you

[963] Interview No. 2.

> know what they're going to say or do. But usually, yes, there are objectors and they can either be local people who want to be members of the class; some of them are simply lawyers who go out and find folks to represent, and as I say, sometimes they are actually public interest groups that take it upon themselves to monitor class action settlements. So *it's a useful part of the process. I won't say that every objection is useful. Some of them are in there solely for the money and so I'm concerned and one of the things we watch for is objectors who are then paid to go away*. That's a problem. You don't want to see that happen. But, yes, it's a useful part of the process.[964] [italics added]

vii. The Discretion to Suggest Amendments

In the course of the interviews, I asked the judges about their perception of the amount of discretion they have to decide one way or another, to approve or disapprove a proposed settlement, and to modify – or suggest amendments to – provisions of the settlement. The majority of the judges interviewed felt that they had, at least in theory, the discretion to decide either way - for or against the proposed settlement. When asked how he would describe the amount of discretion he felt he had, versus the extent

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[964] Interview No. 1.

to which he felt constrained to decide in a certain way, one judge responded that he believes he has

> *[a] fair amount of discretion. If it's not a proper settlement, I don't have to approve it.* The fact that they've come to a settlement, I don't walk in with the view, "that's fine". The analogy is we do a lot of infant settlements and personal injury cases, which aren't quite the same of course, but in those things, people come in front of us and if we've read all the material and decided it seems like a fair settlement, we accept it. If we don't, we don't. And often we may have more questions. So *I don't have any preconceived view*. I mean, *if the parties have reached a settlement, it's not preconceived but you assume they're trying to act in everyone's best interest*. And if reading through the material, there's nothing, or in asking questions, there's nothing that jumps out at you saying that they're not acting in the best interests and given the risks that may be involved in a lawsuit, there you go, I have no qualms saying, "no, I'm not gonna approve this"

> if I think it's fundamentally unfair.[965] [italics added]

Another judge similarly explained that judges must stay within the range of reasonableness when making any suggestion for change to the proposed agreement:

> Q: What was the amount of discretion you felt you had at that stage to decide one way or another? […]
>
> R: You're not there to make a better deal. I mean, it's a negotiating process and you respect that. In any negotiation, one side doesn't get all what they want. I mean, you're not there to negotiate a better deal for the class. You're just trying to make sure that it's reasonable. So you don't have the discretion to go and say to the defendant, "I think you're really bad and you should pay more". That's not your role. It's just: "is it within the range of reasonableness, can you explain to me how it's within the range of reasonableness".[966]

The context of the settlement hearing, and difficulties encountered by judges at the settlement approval stage will be further discussed below, in

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[965] Interview No. 15.

[966] Interview No. 8.

my subsection on the role of the settlement judges. We will then see, notably, that the context of settlement approval is a difficult one for judges who feel that everything has already been decided for them. Therefore, in theory, while the judges interviewed explained that they believe to have a "fair amount of discretion", the reality appears to be that these judges often will not use this discretion to decide against a proposed settlement.

Furthermore, and as I will further describe below in my subsection on the role of the judge, certain of the judges interviewed appear to have used their discretion to exercise a role different from the classical adjudicatory role at the approval stage. They use their discretion to help the parties get the settlement in final form to be approved. They exercise a role of conciliation or negotiation, in a way described as follows:

> […] the approval hearing is not always just: "it's approved and here are the reasons" or "it's not approved and here are the reasons". I think you can, if there are certain areas, you can open it up. […] I was a corporate lawyer, not a litigator before I was appointed, so I'm accustomed to looking at paper, and I would sort of say, "this is unacceptable. Go back. I can't approve it, but I could if". And at that point, you get the sense that some counsel are worn down, they just want out of these at that point. You know, they're done.[967]

[967] Interview No. 8.

This role of negotiator or conciliator is further described in this next subsection.

Conclusion on Settlement Processes

This subsection presenting the data from the interviews relating to settlement processes has revealed important trends in the different jurisdictions.

First, it appears from the interviews that judges generally appreciate fairness at more than one occasion. The practices will vary regarding the need for one or more hearings, whether they be formal fairness hearings or not. At the fairness hearings, only the judge, lawyers and representative will generally be present. There will rarely be objectors or experts testifying at this occasion. Court monitors may participate to assist the judge, but the opinions of judges about the use of such monitors are divided. In any event, "friends of the court" are most welcome in multi-jurisdictional cases. As for the evidence required to evaluate fairness, the written evidence will generally consist of the settlement agreement and appendices, the notices and claims forms, and affidavits by the parties' counsel. Certain judges may require additional evidence, particularly Quebec judges. Finally, while judges generally feel that they have the discretion to approve or reject a proposed settlement, they, in practice, tend to presume its fairness, and ultimately feel obliged, due to their informational disadvantage vis-à-vis the other actors, to approve the deal as it is.

c. Principal Class Action Settlement Actors

The second principal topic addressed in the interviews was the role of the principal settlement actors. The objective was to understand the judges' perceptions of the roles of the actors, specifically in the context of settlement approval. I will begin the subsection with a quick review of the law as it applies in the four target jurisdictions, and as discussed in Chapter II. I will then describe the judges' perceptions of the role of the class action representative, and of its practical involvement in the representation of the class action members, to later discuss the involvement, roles and responsibilities of plaintiff and defence counsel. I will finish with a description of the way the judges interviewed perceive their role and responsibilities at the settlement evaluation and approval stage.

i. Review of the Applicable Law

The representative plaintiff or class representative has a critically important role to play in class actions generally, and at the settlement stage particularly. He or she must be "adequate", and have the required competence, skills, attitude, motivation, interest and financial interest to pursue the action, represent and defend the interests of the class action members. Proper evaluation of the adequacy of representation is required, especially because the representative is a fiduciary or protector of the class members. The duties of the class representative toward class members have not been further defined by the courts or statutes. The general duty and responsibility that they have is one of acting in the best interests of the class as a whole, and of doing so in conjunction with class counsel.

Members become class members once the class is certified. Before certification, the only class member is the class action or named

representative. The other unnamed class action members stay "absent" and inactive until they opt-out, object or claim compensation. They are, nonetheless, the main reason – with the class representative – for the class action and settlement, and they will be bound by the class judgment or settlement unless they opt-out.

The law is unclear regarding the responsibilities of class counsel toward absent or unnamed class members before certification. At this pre-certification stage, unnamed class members are unrepresented, but are protected by the representative. At that stage, counsel officially represent only the representative, but they are required to also consider the interests of the class members. On that issue, Canadian common law offers stronger protections to class members than U.S. law before certification. In the Canadian common law provinces, counsel have before certification a *sui generis* relationship with class members. In Quebec, by contrast, counsel represents only the class representative at all stages of the action.

Finally, the role of the settlement judge has been qualified in the law as one of protector, of fiduciary, and of ombudsman or ombudsperson of the absent class members. The variety of different qualifications adds to the already difficult role that this judge has. Indeed, the traditional adjudicator judge is asked to evaluate the fairness of proposed agreements in a context where the class members frequently ignore the class action and/or settlement's existence, where all the information is in the hands of agreeing settlement parties, and where the judge feels uncomfortable challenging the proposed agreement.

ii. The Class Action Representative

Several of the judges from each of the four focus jurisdictions expressed a concern with both the nature of the representative's function in class

proceedings generally, and with the extent to which the representative adequately represents the class action members. They explained that the representative's role has changed over the years, and that the degree of scrutiny of adequate representation has gradually decreased to a point where the representatives act as mere "figureheads".[968] Indeed, in the words of one judge:

> The class action representatives are bizarre characters. Often they are mere puppets, and behind them are the puppet-masters: the lawyers. According to me, they are often fake representatives. They are figureheads, mere figureheads […] Evidently these people are not able to contribute much to the collective discussion.[969]

Because they consider the class representatives to be mere "figureheads", judges afford little weight to their participation and testimony at the hearing:

> I've never really seen a lot of evidence that the representative plaintiff is much more than a person that fills that qualification. […] they don't tend to be someone who's got tons of experience or acquired a lot of knowledge about the subject matter. They happen to be a person that qualifies

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[968] See Burns, "Decorative Figureheads", *supra* note 350.

[969] Interview No. 3.

> because there's a plaintiff who has maybe a particular interest in the litigation, but not much more than that. I mean, if they really were kind of an organiser of the class and the one responsible for getting information out and that sort of thing, working closely with the lawyers, then their comments would be given more weight. But if they're just a figurehead, then I wouldn't think that they'd be given much weight by the court.[970]

Accordingly, the judges interviewed appear to feel that even if the class representatives came to the fairness hearing more frequently and were examined or testified, they would not have much to say, but that perhaps their testimony would depend on the issue being discussed:

> Whether they'd have anything useful to offer is an interesting question. I suppose it depends on the nature of the suit; if it's a complicated antitrust case or what you call a competition case, they may really not be able to explain very much. If it's a strict search case, then, sure, they can talk about the humiliation they went through; if it's an identity theft case, they can talk about their emotional concerns about the

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[970] Interview No. 17.

> future, what might happen to their credit. So I guess it would vary with the case.[971]

Correspondingly, because representatives tend to be rather inactive at the hearings, judges rely tremendously on counsel and their oral and written representations.

In fact, among the problems cited by the judges regarding the role of the class representative, there is, of course, the identity of the chosen representative, and his or her superficial involvement and knowledge of the case, as explained above. What is also problematic, according to these judges, is the way the action is formed, a question that leads to a larger issue of whether the nature of the class action still respects the objectives of the class action statutes:

> […] the representative is there but they're only there because some lawyer tracked them down. I mean, it's not really like a situation whereby somebody aggrieved came in and said to a lawyer, "I really need some help" and the lawyer looked around and said, "well, maybe we can do a class action here". I think there's more and more whereby plaintiffs are solicited, and I'm not sure that was the original intent of the act.[972]

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[971] Interview No. 1.

[972] Interview No. 16.

Hence, judges are very critical of the way class actions are instituted. They suggest that representatives should be the ones starting the class proceedings and contacting lawyers to represent them, and not the other way around. The towering drive of lawyers over the institution of the class action has led to a lower quality of class action representatives, to representatives who are not the "right" or "best" person to lead the case and represent the numerous class members. As one judges indicated, the representative plaintiff "generally has nothing to say. I mean, a cynical view of the representative plaintiff is it's just someone the lawyers find to put forward. So they play virtually no role."[973] Furthermore, the personal motivations behind the class action filing are questioned: "for whose benefit do plaintiffs file class actions? For them, for the members? In certain cases, the question is easily answered, […] cases where huge sums of money were paid out as attorney fees and the class members were poorly compensated."[974]

One judge was less categorical about the representatives' knowledge and participation in class actions. He indicated that the representatives often do have some knowledge and understanding of the class action details, but that they rarely understand or are able to explain why a proposed settlement is a fair and reasonable one, whether the class action strategy is a good one, or generally how to answer more sophisticated questions:

> I don't expect a representative to be in a position to have the legal knowledge or the experience in class actions to be able to raise concerns independent of their

[973] Interview No. 11.

[974] Interview No. 6.

> counsel. I think they can understand in their own sphere of knowledge, so that they know what their claim is, they know what the claim of the class is, they know what's being offered, they I'm sure know why counsel say it's a reasonable settlement. But they wouldn't know, for example, that in class actions it's possible to structure it in one way or another. Those sorts of more sophisticated knowledge, I wouldn't expect a representative plaintiff to know that. So those sorts of things, I wouldn't feel comfortable in thinking that the representative plaintiff would challenge their counsel on that. So those are the sorts of concerns that I have, you know, why are we structuring it this way as opposed to that way? […] I don't expect them to know that kind of question. So that's why I wouldn't rely on representative plaintiffs.[975]

Ultimately, the problematic representation by the class action representative appears to have created, for the judges interviewed, a crisis of confidence. These judges do not believe that representatives are trustworthy or useful witnesses. To quote one of the judges interviewed:

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[975] Interview No. 12.

"you don't really often have a great deal of confidence in [the representative plaintiff] anyway."[976]

Interestingly, the Quebec judges I interviewed appeared to be more preoccupied by the representatives' failure to adequately fulfil their roles than their Ontario, B.C. and U.S. colleagues. In the words of the following three Quebec judges:

> You would be fascinated to see, when we have settlements, and I ask "who did you contact about the settlement", it's incredible. You have files where you will have thousands of class members, and when they have had contact with 10 or 15, that is generally a lot! […] It is rare, very rare, that a lawyer will tell you that he has spoken to more than 15, 20 class members. Very rare.[977]

> What is mysterious is this: do we use the representative member to instigate the action, then keep in the dark regarding the action? Or does this member truly have a role? According to S. 1003 C.P.C., it is one of the four conditions, that we ensure that the representative is a good representative; but these characteristics of the good representative, once we are told

[976] Interview No. 7.

[977] Interview No. 4.

> that he knows the file, got informed about it, spoke to a few individuals who were in the same situation, that does not inform us about the nature of the mandate that the member gave his lawyers, and even there, I am not sure that there is a mandate given to these lawyers. I do not blame the lawyers. But once the lawyer has found his member, his representative, he may well justify not speaking to the representative by saying that he knows what must be done for the "good" of his client, that he knows what the defendant has done wrong, and that he knows what means should be taken to obtain the best compensation possible for the members.[978]
>
> You know the lawyers have gradually moved to the front page in class action litigation. When the class action was first implemented as a procedure, the representatives used to do all the work and they would thereafter go see a lawyer. Nowadays, lawyers read the Internet and they get organized to identify a potential class action client. In my opinion, we should give the representative's role more importance because he has a role to play,

[978] Interview No. 6.

> and that is important because we must ensure […] that justice is not only done, but that it appears to have been done. I have the impression that people think that class action litigation has become the business of class lawyers.[979]

In fact, some of my interviews of the Quebec judges have suggested that they perhaps seek to enforce adequacy of representation more closely than their common law colleagues interviewed, as specifically transpires from this interview extract:[980]

> When the class action procedure was first adopted in Quebec, we would then ask a lot from the representative. Until the years 1990, the representative was requested to work hard to identify who were the potential class members, and judges insisted that a high proportion of members have been contacted by the representative. […] we wanted the representative to play an active role, such that he would have the credibility of someone who really did the work as requested. After 1990, and until the

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[979] Interview No. 4.

[980] This perception was in fact supported by one Ontario judge who said to me: "I think in Quebec there's a higher gatekeeping because there's a sort of a colour of right standard, from what I understand. So they have a bit more sort of discretion." See Interview No. 10.

> beginning of the year 2000 was a time when we loosened the requirements of the representative's role almost completely. At that time, we did not apply the fairest procedure to the members. Nowadays, we are trying to go back to the law as it was in the beginning, and that is why we question the representative and class counsel a little bit more, to have more momentum and a better idea of what is happening with the members. Could the system be made better? Is it still unfair at this point? I would not say that because we are really trying to discover the interest of the members. But this exercise is a little bit more perilous.[981]

[981] Interview No. 4.

iii. Class and Defence Counsel and the Absent Class Members

In the course of the interviews, I sought to understand the judges' perception of their role and responsibility toward class members. I also wanted to evaluate the perception of judges regarding representation of the class by class counsel and whether they believe that class counsel do, in practice, represent the class, and if not, whether they think they should.

I asked the judges who they thought represented the class members during the course of the class litigation and settlement approval. I found tremendous confusion in their perception of the role of class counsel toward class members. Some avoided my question by answering on another topic altogether. Others clearly stated that nobody represents them (before certification), explaining that "[i]n truth, nobody other than the objectors that show up."[982] The American judge rightly noted that

> "[i]t should be the lawyer, shouldn't it, but as we know, we have the agency question when we're dealing with these class actions where, at least in this country, the lawyers are in there on a contingent fee. […] So in part, the lawyer is representing the plaintiffs, but the lawyer is also representing himself. […] at the end of the day, there's no single person that you can say is unqualifiedly

[982] Interview No. 10.

> speaking for the plaintiff class. That's the problem.[983]

Another judge answered contradictorily, explaining at one point that class members "have class counsel. While it's true the court hasn't, I guess, certified them, the class does have class counsel", and at another, that nobody represents these members ("[n]obody. The judge. […] Nobody. That's the problem.").[984]

Other judges answered in ways that suggested, even if more implicitly, that class counsel does represent the class members. One judge explained that "[…] plaintiff counsel [must represent] those unspeaking voices."[985]

Considering this confusion, two of the judges interviewed suggested that they would like to have independent representation of the members by counsel other than class counsel[986], a recommendation for reform that will be further addressed in my conclusion. To repeat the words of one of them:

> Could we not think about having a lawyer who would be other than the class or defence counsel, who would represent the members and who would question the proposed agreement in the interests of the class members? I don't know. Who would pay for him? With what funds? I don't

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[983] Interview No. 1.

[984] Interview No. 11.

[985] Interview No. 12.

[986] Interview No. 11.

> know. But there is definitely a situation of conflict of interests between class counsel and defence counsel when it is time to approve the deal.[987]

Several of the judges also highlighted the problematic conflicts of interest existing at the settlement stage:

> I mean, it's a pretty heavy responsibility for the lawyer who's carrying a case for a class action because these cases, in terms of economic return to the lawyers, it's always much better when they settle early on from their perspective, rather than spending eight years in a matter. Lawyers are professional but they're also human and judges have to be careful to make sure that the work has been done. You know, it's not a question of as good a settlement as could be obtained, I mean, who ever knows when that's reached, but a reasonable one, that there's been the workup and the discovery, and that's often the complaint of objectors, […].[988]

This conflict is one of the reasons for the judges' careful evaluation of the adequacy of the representation and involvement of counsel:

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[987] Interview No. 4.

[988] Interview No. 17.

> Sometimes, after time, you get to know who the counsel are and that may make you more cautious or less cautious. And I think it's also a question of economics, it's also a question of understanding what the fee dynamics are, how the retainer is structured, what are they gonna get. I was disinclined when people would come up and say, "here's the settlement, this goes to the class and this amount goes to counsel", to sort of carve it out. I mean, "you come back later to talk about your fees". So you understand the dynamic of counsel's involvement.[989]

At the end of it, however, I have found that the judges interviewed rely tremendously on the representations of counsel. That is why they also all give the reputation of counsel primary importance. Indeed, one judge described how trustworthy the overwhelming majority of class counsel are in Toronto, but warned that "every now and then you have a feeling in your gut that they're acting for the devil".[990] The reputation of the lawyers and the fact that they've worked hard gives comfort to deciding judges: "when you've got hard-fighting lawyers that have worked very, very hard, that makes it very easy. You have a certain level of comfort and you take it from there."[991] In the words of another: "[I approach class

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[989] Interview No. 8.

[990] Interview No. 10.

[991] Interview No. 17.

settlements] with a lot of confidence in counsel, to the extent they were by consent, experienced counsel who I had had passed dealings with, so they were people I had a fair amount of respect for."[992]

In fact, one judge aptly explained how the wrongful actions of one specific class lawyer affected his reputation. He suggested that this lawyer's bad reputation is a consideration that may affect how he will evaluate the future representations of settlement fairness made by this lawyer:

> […] there are superb lawyers who are right at the top of the spectrum and there are other lawyers who are much further down. I think all I can say on that, *I think the reputation that the lawyers have is very important.* There are *some lawyers that I feel, rightly or wrongly, I think rightly, one can rely on their integrity. You know, they go out of their way to point out to you certain things, and of course there are limits.* Then there are other lawyers you watch very carefully. I remember early on, probably the first settlement approval case I had, I was very wet behind the ears and I found out afterwards that the plaintiff's counsel had misled me and had misled me by not referring to things that were relevant and they should have known were relevant. When I see those lawyers in the

[992] Interview No. 15.

> courtroom now, I try to put that out of my mind, but, I mean, it's not good advocacy on their part because their reputation is important. Judges don't talk about their cases, but they talk about the lawyers. […] There are some that are superb. I won't mention names, but some in Ontario are really terrific. And there are others who've had their fingers burnt. They saw that this was a way to get big fees. […][993] [italics added]

In the end, the class action lawyers' reputations are generally well-known by the judges across the Canadian provinces, and this information is likely to be shared among them. In the words of one of the judges interviewed:

> I think in every province you know who to watch and you know who you can trust. In one action which I think was reported, counsel came in front of me and asked for [..] a fee of, let's say 35 percent contingency fee, and when I looked at the materials, the contingency fee that they'd entered into was actually 30 percent. So much to counsel's embarrassment, I said no. […] I will forever watch the particular counsel who tried to get a 35 percent

[993] Interview No. 9.

> contingency fee when his own document said that that wasn't available.[994]

On a more general front, the judges interviewed showed concern for the required good faith and honesty of counsel, because, as one mentioned "if lawyers are not open, frank and complete with us, then the system is wronged at the outset. So we must rely a lot on counsel."[995] Ultimately, when asked what he thought about the involvement of lawyers in the class action settlements, one judge aptly commented:

> I'm troubled, I'm uncomfortable with it, I'm uncomfortable with the fact that at the end of the day, what the public sees is the lawyers walking away with millions and the individual class members getting 10 dollars. The appearance of it is very troubling, but I don't have a solution […][996]

This concern for the public interest and opinion is important. Confidence in the civil justice system depends on the appearance of fairness.

In the end, I understood from the judges interviewed that they generally feel that because nobody really represents the class members, they will keep a close eye on the lawyers and ask a lot of questions to protect the members.

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[994] Interview No. 16.

[995] Interview No. 4.

[996] Interview No. 1.

A few of the judges interviewed were concerned with the involvement and responsibilities of the defendants and their counsel at the time of settlement. The judges from Quebec and the U.S. federal court referred to the duty of candour of the parties regarding the proposed settlement. One Quebec judge interestingly explained that defence counsel do have a role to play:

> I believe that defence counsel also have a role to play, and we tend to speak only about the plaintiff; but the defendants, in my mind, have a role to inform, especially when we are talking about product liability cases. They have an important role of disclosure about the nature of the product, and its dangerous aspects. I want to be able to rely on what they will have argued relating to the product to have a general idea, […] to have a better understanding of what it is all about […][997]

The American judge agreed that parties are held to a duty of candour and disclosure, albeit a narrower one than the one applicable in the Canadian common law jurisdictions:

> the party seeking approval must file a statement identifying any agreement made in connection with the proposal. They have to let us know all their side

[997] Interview No. 4.

> agreements or hidden agreements, or else they're violating their obligation of candour to the court. […]
>
> It may not be as broad as what Justice Winkler has suggested, but it's part of it. You can't have any side agreements that you don't disclose.
>
> […]
>
> the lawyers down here […] will, as part of the motion of requesting approval, file a lot of information automatically. Now, whether they will actually go into detailed negotiations, no, they probably won't. What they will do is talk about the difficulties of the case, talk about other cases and what they settled for or what judgments there were, talk about the expenses, the costs that were involved, talk about what remains to be done before it can get to trial, talk about the risks of trial, etc. But, […] do they tell me the sort of back and forth that went on before they got to the settlement? Probably no.[998]

Accordingly, while the B.C. and Ontario judges interviewed made no mention of the duty of candour, which exists in the caselaw applicable in

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[998] Interview No. 1.

the two jurisdictions, the Quebec and American judges interviewed agreed that defendants have a duty to disclose fundamental elements of the transaction, in line with the required duty of candour of the Canadian common law provinces.

iv. Class Action Settlement Judges

A significant portion of the interviews dealt with the role of the settlement judge. In this subsection, I will present and discuss the answers provided by the judges regarding their perceptions and opinions on that topic. I will also attempt to draw interesting – but tentative – parallels and distinctions between the different jurisdictions. Of course, these situations are very complex or multivariate and without more data, I cannot tell with certainty what is really going on or how there may be varying practices among the rest of the judges.

In the thesis, I have explained the difficulty with the judges' task of reviewing and approving class settlements. At that stage, one of my thesis' hypotheses was that the court's task is made difficult because adversarial presentation, the hallmark of common law adjudication, is missing. The judge is presented with a proposed settlement while counsel agree and argue that the settlement is fair and reasonable and in the best interests of the class. Accordingly, another of my preliminary hypotheses was that the role of the settlement judge is ill-suited to the process as it currently stands. The interviews conducted support this proposition.

As appears from Table IV below, which summarizes the opinions of the judges interviewed regarding the adequacy of their role, nine (9) of the fifteen (15) judges interviewed and asked that question answered that they believed the judge's role was either unclear or inappropriate. Six (6) others stated otherwise. British Columbia has the greatest number of judges

interviewed satisfied with their role as currently provided in their laws. Quebec and Ontario have a majority of dissatisfied judges interviewed.

Table IV: Opinions Regarding Clarity and Appropriateness of the Role of the Settlement Judge:

	N/A (Judge Expressed no Opinion)	**Believes Role Unclear or Inappropriate**	**Does Not Believe Role Unclear or Inappropriate**
1 : 2009-J-CL-BC-1	0	0	1
2 : 2009-J-CL-BC-2	0	1	0
3 : 2009-J-CL-BC-3	0	0	1
4 : 2009-J-CL-BC-4	1	0	0
5 : 2009-J-CL-BC-5	1	0	0
6 : 2009-J-CL-BC-6	0	0	1
7 : 2009-J-CL-O-1	0	1	0
8 : 2009-J-CL-O-2	0	0	1
9 : 2009-J-CL-O-3	0	1	0
10 : 2009-J-CL-O-4	0	1	0
11 : 2010-J-CL-O-5	0	1	0
12 : 2009-J-CC-QC-1	0	1	0
13 : 2009-J-CC-QC-2	0	1	0
14 : 2009-J-CC-QC-	0	1	0

3			
15 : 2009-J-CC-QC-4	0	0	1
16 : 2009-J-CC-QC-5	0	0	1
17 : 2010-J-CL-US-1 TOTAL :	0 2	1 9	0 6

(1) The Context: Lack of Adversarial Presentation

My analysis of the answers provided by the judges about their role cannot be complete without a few words on the judges' perception of the context of settlement approval, of the difficulties encountered at that stage, and of the general impressions felt.

All of the judges interviewed mentioning having difficulties with the settlement process, which difficulties are related in great part to their role at that stage. For the judges interviewed, settlement approval is an uncomfortable, unpleasant and lonely process, a part of their daily work that they do not generally enjoy. As one judge explained:

> after [we come] out of a fairness hearing, having approved a settlement, [we] often [feel] like taking a shower. You know, you just come out with that awful feeling and you don't want to feel that counsel have

> not played ball with you, but so often you come out and you're just not sure, and it's a very unpleasant feeling.[999]

The process is made difficult by the fact that everyone is in favour of the settlement, and the judge is alone trying to see the truth in it or challenge it. As one judge candidly explains, counsel "come in, they want the fairness hearing. They're ready, they've got their order for me to sign. They're just waiting there."[1000] Put differently, "on an approval hearing, all the lawyers are talking out of the same side of their mouths, aren't they? They all want it to happen."[1001] They form a "monolithic bloc, in which the adversary becomes me, and I am an obstacle to conclusion of the case."[1002]

On the difficulty of the exercise, three different judges explain:

> I mean, you've lived with or seen some people for a period of time who have been posturing about how great their case is. Now they're posturing to a certain extent on how their case had problems, and without conceding that it had any problems, they say the settlement was reasonable having regard to those problems. And defendants are in a similarly odd situation where before, they

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[999] Interview No. 9.

[1000] Interview No. 9.

[1001] Interview No. 2.

[1002] Interview No. 3.

> indicated that the class definition, for instance, was too big and the questions couldn't be answered. Now all of that's changed and they're quite happy. So *it's interesting to watch; it's difficult to deal with, though*.[1003] [italics added]
>
> I think the *settlement hearings were the most difficult thing that I did as a class action judge* because typically, what happens is that the parties arrive at the settlement. *Very, very often, the defendants do not really care how the pot of money is going to be allocated. It's just a pot of money as far as they are concerned. And so they are usually gagged.* Usually, by terms of the agreement, they're not really speaking too much to either the settlement terms but in particular the fee approval, which often go hand in hand, so you're often being asked to approve the settlement and approve the fees at the same time. With respect to the settlement, the defendants generally get up and just say they support the settlement and they reinforce what the plaintiffs tell you. So we have […] some law and a long list of factors that we are to

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[1003] Interview No. 10.

> apply to test whether the settlement is fair and reasonable and in the best interest of the class. But when you think about what the alternative to settlement is, the alternative to settlement is that they go to trial, *it's very difficult to not approve a settlement. I always, in the end, approved the settlements*.[1004] [italics added]

> *That's not a role that a judge is accustomed to having and suddenly you are more like a continental judge with an inquisitorial role and you have no adversaries to hep you anymore because everybody is on the same side and telling you how wonderful the settlement is, etc., etc. So it's a very demanding role*.[1005] [italics added]

Another problem with the process is the fact that the judges interviewed indicated not having as much information about the case as do the parties and lawyers. They are at an informational disadvantage: "one of the difficulties obviously that we have on these things is that we have limited time and limited knowledge […]".[1006]

Certain judges are seriously uncomfortable with the approval process, while others profoundly dislike it. One judge indicated that it's a role some judges don't like:

[1004] Interview No. 11.

[1005] Interview No. 1.

[1006] Interview No. 16.

> […] *it's a very odd process: it's non adversarial, and by the time they come to settlement, everybody has vested interests in it, so you're the one who really has to come in and it's a role some people don't like*. I actually found it probably the most interesting part of it because you come in and you try to figure out what it's really about and you're really looking to protect the interests of the class members.[1007] [italics added]

Another judge explained how uncomfortable the process feels:

> I would say that when you're determining whether something is fair or not, *there's a broad range of fair, so that unfortunately there's not a lot of roadblocks that get us to whether it's fair or not, or not a lot of goalposts or whatever you want to call it.* You know, I think judges are happiest when they can go down a list of things and say, okay, it has this and it has that, and it has this and it has that, and it has this, and therefore I can conclude it's fair. But *fairness is such a vague kind of concept that I think most judges are very unhappy in trying to decide this kind of amorphous thing,*

[1007] Interview No. 8.

> *particularly when you have a group of people that are not really actively represented, are not actively in court.* They're represented, but they're not actively in court. I think *that makes a lot of judges feel uncomfortable, including me*. While the words are there in the legislation, it's not easy to pick out the evidence that leads to that conclusion, and that's made more difficult by the fact that everybody is onboard and nobody is interested in pointing out the weaknesses."[1008] [italics added]

In fact, many of the judges interviewed indicated that they felt that they were not trained or well-equipped to be settlement judges:

> They're not adversarial at all! And so who then is going to play that adversarial role? It has to be the judge. The judge has to take on the role of being the adversary and say, "well, is it really so good, is it really so great". And we're not equipped to do that. Frankly we're just not equipped because we're adjudicators.[1009]
>
> […] as you're well aware, in the settlement approval hearing, the fairness hearing, you've got the plaintiff's counsel

[1008] Interview No. 12.

[1009] Interview No. 11.

> and the defendant's counsel telling you what a great settlement it is and your job is to see that it's fair and reasonable and in the interest of the class. It's very easy to say that, very difficult to actually discharge that responsibility because you only know what counsel want to tell you. *Arguably, one should adopt an inquisitorial approach, but we're not trained to do that and you always feel it's rather hit and miss.*[1010] [italics added]

I have learnt in the course of the interviews that these discomforts, difficulties and awkwardness have led to situations where the judges interviewed have felt constrained to decide in a certain way and approve the proposed settlement. To repeat the words of one judge: "it's very difficult to not approve a settlement. I always, in the end, approved the settlements."[1011] And when asked about the amount of discretion he felt he had at the approval stage, one judge candidly indicated that he felt he had no discretion to decide against approval:

> Q: How would you describe the amount of discretion that you have in the different types of settlements, versus the extent to which you feel you are obliged to decide in a certain way?

[1010] Interview No. 9.

[1011] Interview No. 11.

> R: I think we have very little discretion, virtually none. Either we decide that the settlement is not in the best interest of the class, or it is. And while there's a bit of dancing around the topic in preapproval things about how the settlement might be sweetened in some sort of way, you know, you can say, "well, I'm a bit concerned about this" or "I wonder about this", beyond doing that, which is not discussion but is more advisory, and we can't advise because we're not advisors, so I don't think I have any discretion. I'm only aware of maybe one or two cases where judges have refused to settle.[1012]

I have understood that these judges tend to automatically approve proposed settlements for three different, principal reasons. First, it sometimes is because they feel that the only possible solution is to go in the same direction as everyone else who is in favour of the settlement, and just approve it to satisfy everyone. As one judge explained: "I mean, traditionally we've been an adversarial system and the adversarial aspect just drops out. And the psychological dynamics, everybody is in favour of this, why not do it?"[1013] Second, it sometimes is because they just cannot obtain any additional information against the proposed settlement. They are victims of their own informational disadvantage. Third, it sometimes

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[1012] Interview No. 10.

[1013] Interview No. 7.

is because they believe that settlements are contracts and that they should not get in the way of them. Indeed, the judges who have a tendency to approve the settlements as contracts tend to rubberstamp proposed settlements. They tell me "Why should I get in the way?"[1014] The latter approach is typical of one tendency in settlement review, which I address below in Table V.

Throughout the course of the interviews, I found that the judges had different approaches in their review of proposed class action settlements. Some of the judges interviewed indicated that they choose to question settlements a lot – which correlates with their tendency to be very proactive and inquisitorial. Others indicated that they will tend to question the settlement, but only when they see red flags suggesting unfairness. Hence, they have a less aggressive approach than the first group. To understand this approach, it is useful to read the following extract:

> Q: What do you feel your role should be toward absent class members?
>
> R: Well, the role, as best you can, is to try to see, reading through the material, whether anything jumps out at you, saying: "hold it, there's something…"[1015]

A third category of judges explained that they would tend not to question proposed settlements, viewing them instead as voluntarily agreed-to contracts that must not be disrupted. These judges view their implication as a potential obstacle to the peace of settlement. Table V below

[1014] Interview No. 2.

[1015] Interview No. 15.

summarizes the results found. This table is presented as a continuum of questioning practices and styles, which begins with aggressive questioning and ends with almost no questioning by the reviewing judge.

Table V: Tendencies in Settlement Approvals:

	Questions a Lot	**Questions When Sees Red Flags**	**Respect Settlements as Contracts**	**N/A**
1 : 2009-J-CL-BC-1	0	0	1	
2 : 2009-J-CL-BC-2	0	0	1	
3 : 2009-J-CL-BC-3	0	0	1	
4 : 2009-J-CL-BC-4	0	0	0	1
5 : 2009-J-CL-BC-5	0	0	1	
6 : 2009-J-CL-BC-6	0	1	0	
7 : 2009-J-CL-O-1	0	1	0	
8 : 2009-J-CL-O-2	0	1	0	
9 : 2009-J-CL-O-3	0	1	0	
10 : 2009-J-CL-O-4	0	1	0	
11 : 2010-J-CL-O-5	0	1	0	

12 : 2009-J-CC-QC-1	0	1	0	
13 : 2009-J-CC-QC-2	0	1	0	
14 : 2009-J-CC-QC-3	1	0	0	
15 : 2009-J-CC-QC-4	1	0	0	
16 : 2009-J-CC-QC-5	0	0	1	
17 : 2010-J-CL-US-1 TOTAL :	0 2	1 9	0 5	 1

This table highlights some of the differences in approach to class settlements in the judges interviewed, per jurisdiction. The majority of the judges interviewed (9/17) questions proposed settlement when red flags indicating unfairness appear. Five (5) of the judges interviewed respect the settlements as contracts, have never denied a proposed settlement or attempted to get in the way or challenge such a settlement. They essentially will approve settlements quasi-automatically. The majority (4/5) of those judges interviewed that easily approve and chose not to question much are B.C. judges. The Ontario judge and the U.S. federal court judge question the settlement when they see red flags. In Quebec, I have had different results that are worth highlighting. Two (2) of the Quebec judges interviewed question the settlement when they see red

flags, while one (1) does not question much. The only two (2) judges interviewed who question aggressively and tend to highly challenge proposed settlements are from Quebec. Of course, since the sampling is very small, and the interviews were qualitative, the results only have indicative or tentative value. Only one interview was harder to interpret on that question and for that reason, I answered "N/A".

Interestingly, one of the judges interviewed attempted to explain the differences in approach by the number of years of experience and the caseloads of the judges. He explained that the differences in approach were, in his opinion,

> based on experience. I think that when judges are first exposed to class actions, their attitude is "so let's just let the settlement take its course, we should respect what the lawyers have done". And as they see more of them, they begin to realise that the adversarial process really doesn't work with class actions and they become much more committed to the idea that they have to intervene. And then I think another factor is that a busy judge with a heavy docket, it's so difficult to give the concentrated attention to a class action case that it takes, that it can become very frustrating and you can almost have a guilt complex about it because you're so busy with your guilty pleas and sentencing and trials that you can't give it

> that volume of attention that it needs. And
> so that creates frustration as well.[1016]

Hence, his suggestion is that the more experienced the judge, the more interventionist and questioning he will be. My interviews do not tend to support this proposition. Some of the more experienced judges I interviewed tended not to challenge settlements. Some of the others were aggressive and tended to heavily challenge proposed settlements. As for the caseload factor, I have insufficient data to support this proposition and cannot conclude from the interviews that this factor encourages judges to intervene more. I do not, however, have the impression from the interviews conducted that this factor is a primary one in the judicial attitudes towards settlement.

[1016] Interview No. 1.

(2) The Role of the Settlement Judge

a. A Complex, Multifaceted Role

The judges interviewed perceive their role as being complex and multi-faceted, in ways that lead them to conclude to its difficulty. One judge aptly explained the variety of roles that the class action judge has, and which affect the settlement approval stage:

> First, we must never forget that the judge is an adjudicator. The judge will have fundamental decisions to make such as whether to certify a case or not. Then, he will also have interlocutory judgements […] So the judge must adjudicate. It is his fundamental role and he must preserve the discretion to adjudicate impartially. […] The judge is also a case manager. He must advance his file, and must be proactive with the lawyers, setting meetings with them and asking them about the case. […] the judge becomes a sort of cheerleader […]
>
> The judge's role is complex, but it is also why it is interesting. […] the settlement hearing is a hearing at which we much combine all of our abilities […] We have

> all of that in the same file. We must use all of our abilities at once.[1017]

Some judges see their role as a balancing role, and one that is also very intuitive:

> […] "the little guy in here tells me". It's a little bit like that. *It's a balancing function. I think there are several things wrong with our class procedure, but this is just about the hardest and most unsatisfactory aspect of it.* Instead of saying "unsatisfactory", I should say "unsatisfying" because you never know. And it bothers me that you don't find any cases where a settlement has been denied. Now, I can say, alright but I've argued with counsel and they changed it and that's alright, I suppose, that's tantamount to a denial, a denial of their original proposal, but…[1018] [italics added]

Interestingly, the majority of the judges interviewed perceive their role at settlement approval as being different from their role certifying class actions. Several of the judges interviewed, however, could not explain very clearly why that role may be different, and instead offered very

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[1017] Interview No. 3.

[1018] Interview No. 9.

different, quasi-explanations, as evidenced by these varied responses from judges from different jurisdictions:

> R(1): Well, the certification stage is whether there is a definable legal claim and whether it is clear enough that it should be certified. Whereas the settlement, it's merely the fairness of the settlement. You would take into account whether all of those things that would go on certification, but it's a much different assessment, I think.[1019]
>
> R(2): I think it is different but it's still adjudicative.[1020]
>
> R(3): Yes. Settlement is a more active process.[1021]
>
> R(4): we are better equipped to judge on authorization […] better equipped in terms of the evidence, of what is tangible, […] in terms of criteria also. Everything. Fairness is a concept that will evolve, but at this point, we do not have much to work with. [It is a subjective concept].[1022]

[1019] Interview No. 16.

[1020] Interview No. 10.

[1021] Interview No. 8.

[1022] Interview No. 6.

Interestingly, one of the judges interviewed agreed that the role is different, and explained the difference principally by the amount of control the judge has at the certification stage, as compared to the settlement approval stage. He explained:

> When you go to trial, the judge directs the trial. He amasses elements of proof, of law, and thereafter decides the case. But at the settlement approval stage, the judge decided nothing. He is not the manager at that stage. He must apply a few large criteria, were the formalities fulfilled, and secondly, does it fulfill the fairness and reasonableness criteria? […] It's a judgment call. […] this is it. That's the way it is. […] Another difference is that at the end of the trial, you know exactly how it works; you will have listened to the evidence, you will have deliberated, you will issue a decision.[1023]

Some of the judges interviewed, on the other hand, indicated that they believe the task of judgment on the merits in class action litigation is more challenging than the task of settlement approval:

> A: […] it's a more difficult task, isn't it, because you have to write the judgment and you have to provide the solution or the remedy. So I guess the responsibility is

[1023] Interview No. 5.

> heavier on the judge who has to provide that remedy. In the other case, it's done for you. The remedy is there. All it needs is blessing.
>
> Q: Judges feel more comfortable judging the authorisation for the case on the merits than judging the fairness of the proposed settlement.
>
> R: More comfortable in our traditional role than we would be approving a settlement?
>
> Q: Yes.
>
> R: No, I don't think so. It's more difficult for us to provide the appropriate remedy than it is to bless a remedy that is provided in the settlement. So I can't agree with that.[1024]

This judge tends to respect settlements as contracts and views his role as one of adjudicator. He will also not be the type to be inquisitorial, and that is why he believes that the role of the settlement approver is somewhat easier as no questions are to be asked.

[1024] Interview No. 2.

b. Judicial Perceptions of the Role of the Settlement Judge: Negotiator, Conciliator, Adjudicator

When asked about their perception and understanding of their role at the settlement approval stage, the judges interviewed provided very different descriptions. I was able to categorize these descriptions in three different kinds of settlement judges: the negotiator, the conciliator and the adjudicator. These categories are larger categories which provide a different insight on the differences of perception that may exist in the roles of the settlement judges. Of course, one limitation to this categorization's validity and reliability is the fact that it is founded upon my interpretation of the judge's interviews.

The adjudicator can easily be associated to the image of the neutral judge who hears the parties before him and does not get involved in the negotiations, or in suggesting amendments to the proposed agreement. He seeks to understand the deal, hears the parties and decides whether to approve or not in a typically adversarial manner. This category of judges will include judges who are not inquisitorial. Here is how one adjudicatory judge described his role:

> Well, the role of the judge is to assess the fairness of the settlement. It's not much different from an infant settlement. You have to take what you're given, you have to rely on counsel to do their job and you have to take what you're given and assess whether or not… and if it appears to be a reasonable and fair negotiation and it

> appears to be within the range of reasonableness, you have to ask yourself, for what are people going to settle? You're not gonna get top dollar on a settlement because the whole point of this is that, number one, the defendants don't want to go to court, the plaintiffs don't want to go to court, they want a compromise. So the question is, given what you know about the background to the problem and its origin and the range of numbers and all this kind of thing and what the measure of damages appears to be, what's been done in other cases, does it appear fair and reasonable.[1025]

The conciliator is a judge who is neither an adjudicator, nor a negotiator. He wants to serve the parties well so that they are able to reach approval and implementation of the settlement. He wants to conciliate the parties, will listen to them and be slightly more involved in helping them solve the leftover issues such that he can approve the settlement. This judge is less aggressive and involved than the negotiator, but more so than the adjudicator. One example of a conciliator judge is the following judge, who qualifies the process of hearing, discussing and approving class settlements as one of "dress rehearsals":

[1025] Interview No. 13. Here is an extract from another adjudicator judge: "At the settlement approval stage, I understand my role to be as it's been described in the case law which is to determine whether the proposed settlement is in the best interest of the class, having regard to a variety of factors and not to make a settlement but simply to determine whether the one that's before the court is satisfactory having regard to that test and those factors." See Interview No. 10. Also see Interview No. 6.

> So that by the time you get to the settlement hearing, any wrinkles in it have kind of been ironed out. We're not allowed to modify the settlement in any way, so all we can do is express concern about certain aspects of it and ask questions about it and signal that they may wish to think about certain terms in it as to whether it would be approved or not. So I guess what I'm saying is by the time I actually hear the request for settlement approval, we've had several dress rehearsals, you could say, and I think they can be fairly certain I'm going to approve it. Not every judge does it that way, but that was the way I did it.[1026]

As another judge explained, the idea behind a more collaborative role is not to be more inquisitorial, but instead, to be more involved:

> more inquisitorial, necessarily, but to get involved with each of the settlement's provisions, to ensure that they are fair and reasonable for the class as a whole, because it is obvious that the two parties that come before us have a common interest and therefore we must enquire more as to the more questionable

[1026] Interview No. 11.

> provisions, the more sensible issues for class members, judges must bring them to the table. We do look at those more closely. [1027]

The negotiator is at the other extreme. He is the judge who becomes closely involved with the parties to achieve settlement. He is one who will be sitting down with the parties, actively discussing the provisions of the settlement and seeking to have them in proper form to be approved by a judge. He is one who will suggest amendments, and reconsider amended versions until the settlement is in proper form to be approved. The two judges I found to fit this description were in legal practice before becoming judges and have significant experience negotiating complex transactions. This explains the nature of their involvement in getting the case to approval, and their style of judging, which one considers to be more "collaborative".[1028] I, in fact, believe they instead are true negotiators.

Table VI below serves to summarize the results of my interviews:

[1027] Interview No. 4.

[1028] Interview No. 3.

Table VI: Perceptions of Role of Settlement Judge:

	Negotiator	**Conciliator**	**Adjudicator**
1 : 2009-J-CL-BC-1	0	0	1
2 : 2009-J-CL-BC-2	0	0	1
3 : 2009-J-CL-BC-3	0	0	1
4 : 2009-J-CL-BC-4	0	0	1
5 : 2009-J-CL-BC-5	0	0	1
6 : 2009-J-CL-BC-6	0	0	1
7 : 2009-J-CL-O-1	0	1	0
8 : 2009-J-CL-O-2	0	0	1
9 : 2009-J-CL-O-3	0	0	1
10 : 2009-J-CL-O-4	1	0	0
11 : 2010-J-CL-O-5	0	0	1
12 : 2009-J-CC-	0	0	1

QC-1			
13 : 2009-J-CC-QC-2	0	1	0
14 : 2009-J-CC-QC-3	0	1	0
15 : 2009-J-CC-QC-4	1	0	0
16 : 2009-J-CC-QC-5	0	0	1
17 : 2010-J-CL-US-1	0	0	1
TOTAL :	2	3	12

This table serves to demonstrate that the great majority of the judges (12/17) interviewed are adjudicators when it comes to approving class action settlements, in line with their traditional role. Only five (5) of the judges interviewed feel free to act differently and become more involved in the process. Two (2) of the judges interviewed with a legal background doing transactional work make it a personal duty to lead the case to approval. Their involvement has the potential to create potential conflicts of interest; indeed, they clearly want the case to settle. Three (3) other judges interviewed are somewhere in the middle and consider themselves as what I characterize as conciliators.

All the B.C. judges that were interviewed are adjudicators, while three (3) of the Ontario judges interviewed were adjudicators, one (1) was more of a conciliator and one (1) was a mediator. The Quebec judges interviewed

are half and half adjudicators and conciliator, and only one (1) Quebec judge is a negotiator. The U.S. federal court judge interviewed is more of an adjudicator. These results are interesting in highlighting differences in judicial attitudes in the four target jurisdictions. Indeed, the Quebec judges I interviewed appeared to be less adjudicatory, and generally more involved in the settlement approval process in being closer to the negotiating parties, and readier to suggest modifications to the settlement's provisions than their colleagues.

c. Protectors, Fiduciaries, and Ombudsmen

I asked fifteen (15) of the seventeen (17) judges interviewed whether they agreed with a proposition that the settlement judge is a protector of absent class members; that at the settlement approval stage, the judge must primarily consider their interests. Having received interesting and important information, I sought to separate the judges' responses in three different categories: (1) those who do not consider themselves as protectors; (2) those who consider themselves as protectors, but do not act/or know how to act as such; and (3) those who consider themselves as protectors and act as such.

One word of caution is warranted at this point. All six of the B.C. judges interviewed answered that they agreed with the role of protection, but the interviews gave me the impression that the judges were not very familiar with the concept of "protector". Some of the judges' responses were unclear:

> Q: Some have mentioned that the role of the judge is one of protector of the absent class members. What do you think about that?

> R: Well, I suppose it's a different way of saying what I've already said. My concern is with respect to fairness, with regard to those people, and so, protector, I suppose so. I suppose they're equivalent.[1029]

Other B.C. judges agreed with the role of protection, but were unsure what that role referred to, and in most cases, assimilated the role of the settlement judge to the role of the judge involved in approving infant settlements. Of course, these roles being similar - if not identical, and aiming at the protection of vulnerable individuals in both cases, their responses implied that they agreed with the role of protection. Three of the B.C. judges interviewed explained:

> R: Well, I guess it would be likened to a settlement involving infants where we have a statutory mandate obviously, where they're infants involved, to do what is in the best interests of the infants, and I'm not equating to plaintiffs in the same way, but court approval is being sought and therefore the fairness of it and the analysis of it should be fairly extensive.[1030]
>
> The analogy is we do a lot of infant settlements and personal injury cases, which aren't quite the same of course, but in those things, people come in front of us

[1029] Interview No. 12.

[1030] Interview No. 16.

and if we've read all the material and decided it seems like a fair settlement, we accept it. If we don't, we don't. And often we may have more questions. So I don't have any preconceived view. I mean, if the parties have reached a settlement, it's not preconceived but you assume they're trying to act in everyone's best interest. And if reading through the material, there's nothing, or in asking questions, there's nothing that jumps out at you saying that they're not acting in the best interests and given the risks that maybe involved in a lawsuit, there you go, I have no qualms saying, "no, I'm not gonna approve this" if I think it's fundamentally unfair.[1031]

R: Well, the role of the judge is to assess the fairness of the settlement. It's not much different from an infant settlement. You have to take what you're given, you have to rely on counsel to do their job and you have to take what you're given and assess whether or not… and if it appears to be a reasonable and fair negotiation and it appears to be within the range of reasonableness, you have to ask yourself,

[1031] Interview No. 15.

> for what are people going to settle? You're not gonna get top dollar on a settlement because the whole point of this is that, number one, the defendants don't want to go to court, the plaintiffs don't want to go to court, they want a compromise. So the question is, given what you know about the background to the problem and its origin and the range of numbers and all this kind of thing and what the measure of damages appears to be, what's been done in other cases, does it appear fair and reasonable.[1032]

The judges interviewed from other provinces tended to be convinced about the required role of protection of the settlement judge. I have summarized in Table VII below the results of all the interviews conducted.

[1032] Interview No. 13.

Table VII: Perceptions of Role of Protector of Absent Class Members:

	Does Not Consider as Protector	**Considers as Protector; Does not Know How to Be One; Does not Act as Such**	**Considers as Protector and Acts as Protector**
1 : 2009-J-CL-BC-1	0	1	0
2 : 2009-J-CL-BC-2	0	1	0
3 : 2009-J-CL-BC-4	0	1	0
4 : 2009-J-CL-BC-5	0	1	0
5 : 2009-J-CL-BC-6	0	1	0
6: 2009-J-CL-O-1	0	1	0
7 : 2009-J-CL-O-2	1	0	0
8 : 2009-J-CL-O-3	0	1	0
9 : 2009-J-CL-O-4	0	1	0
10: 2009-J-CC-QC-1	0	1	0
11 : 2009-J-CC-QC-2	0	0	1
12 : 2009-J-CC-QC-3	0	0	1
13 : 2009-J-CC-QC-	0	0	1

4			
14 : 2009-J-CC-QC-5	1	0	0
15 : 2010-J-CL-US-1 TOTAL :	0 2	0 9	1 4

What this table indicates is that two (2) of the fifteen (15) judges interviewed and asked about the role of protection answered that they did not consider themselves as protectors of absent members. The majority of the judges (9/15) consider themselves as protectors, but either admit to not knowing how to act as protectors, or it derives from the interview that they clearly do not act as such or do not know what the expression "protector of absent class members" refers to. Four (4) of the judges interviewed and asked that question indicated that they considered themselves as protectors and I found it clear from their general responses that they act as protectors as well. My conclusion that they acted as protectors came from indicators identified in the course of the interviews such as a caring attitude, a careful concern for identification of the interests of class members, a careful examination of the provisions of the agreement, etc.

The most classical expression of the role of protection is, for example, when a judge explains that he is "responsible for the absent class members throughout the whole process"[1033] and his statement is supported by examples of acts of protection. Another example is when a judge explains: "The judge without any doubt at all is fulfilling the role of in effect counsel

[1033] Interview No. 11.

for the class. Your job is to protect the interest of the class and judges are generally not very well equipped to do so."[1034]

Interestingly, certain of the judges interviewed recognize that they have a duty of protection, but they indicate that this duty only arises when there are no objectors to the proposed settlement. They then consider that no one is there to protect the members and hence, that the judge has to do it:

> […] sometimes there's no objector there and it's the job of the court to scrutinise it to make sure that this isn't just a cosy settlement. I mean, it's a pretty heavy responsibility for the lawyer who's carrying a case for a class action because these cases, in terms of economic return to the lawyers, it's always much better when they settle early on from their perspective, rather than spending eight years in a matter. Lawyers are professional but they're also human and judges have to be careful to make sure that the work has been done. You know, it's not a question of as good a settlement as could be obtained, I mean, whoever knows when that's reached, but a reasonable one, that there's been the workup and the discovery, and that's often the complaint of objectors, they say, "look at the work

[1034] Interview No. 8.

> that's been done; they haven't done these interviews, or they haven't retained an expert in this area; this is what you would expect if they were really pushing hard". And the lawyers say, "well, this is gonna come out of somebody's pocket and I'm sure you could retain a psychologist or something that's gonna cost 10,000 dollars". The defendants aren't just gonna keep paying for these, those are gonna come out of the settlement fund. So these are the things you gotta weigh.[1035]

Others will agree with the duty of protection, but instead place the burden of protection on class counsel: "I feel that the responsibility of protection is it's very much driven by the parties. In a particular case, I suppose my prime concern was and will always be are the lawyers really looking out for everybody involved".[1036]

Quebec judges firmly believe in the role of protection, which they refer to as the role of "ombudsman" to class members, a word that connotes a stronger role of protection than the mere word "protector". As they explain:

> [R1] We have that role. The caselaw speaks about the ombudsman of class members. […]

[1035] Interview No. 17.

[1036] Interview No. 14.

> Q.: Do you also consider yourself to be a protector of class members?
>
> [R1]: Yes, yes, yes, yes. That is why I am a little bit preoccupied, because there are times when I wonder if there are things that I do not understand, […] what was discussed by the parties before they came to an agreement. We don't know what was left aside or unresolved. We are not privy to these discussions. So how can we play our role of ombudsperson of the representative or of the class members when we do not know all of this?[1037]
>
> [R2] I see myself as an ombudsman. […] I worry about absent class members' interests, similar to a checklist in my mind. I tell myself, "don't forget them". […] that is my conception of the role of the judge. In fact, the judge has a variety of different roles in this situation, but this role is fundamental […].[1038]

For certain of the judges interviewed, the role is one of balancing the competing groups' interests and the role of protection comes when red flags of unfairness are raised:

[1037] Interview No. 6.

[1038] Interview No. 3.

> [Y]our role [is to make] sure that between these competing groups it's fair. When it becomes issues of collusion or lack of effort or a desire for a quick settlement or something like that, then this role that you've described as the protector moves to the forefront a little bit.[1039]

Interestingly, two of the judges interviewed indicated that they do not believe they have a role of protector, except within the context of examining the fairness factors. One of the two judges explained:

> *I think that we don't have that role, save insofar as it's subsumed by the test and the factors that are examined*. I mean, the court is not class counsel and we're not an advocate; so I don't regard it as my role or the court's role to obtain a better settlement or to make an argument in favour of the settlement. I regard the role as primarily adjudicative within the context of that test. So, no, I don't see it as being exercising some pseudo *parens patria* jurisdiction. If we're not convinced that it's a good settlement, then I suppose we have protected the interests of those people who would otherwise have been bound by it; but *I regard that as a by-product*

[1039] Interview No. 17.

of the processes as opposed to being the role of the court.

[…] the job of judges has changed over the course of the years but the paradigm was an impartial adjudicator. Not a mediator, or an inquisitor, but an adjudicator. To the extent that we take on a role of protecting the class as opposed to measuring whether the class has been protected would be a different role. I don't see myself as taking on the role of the class' protector. I simply measure whether or not the class has been protected, which I think is different.

[…] I've had a lawyer recently say to me, the other day, that I have a job to protect the class. I said to him, "*I don't have a job to protect the class; I have a job to see that a test is met*". But there is an impression that some people have, both at the certification level and also at the settlement level, that the court's role is to protect the class.

[…] deciding that something is in their best interest and acting in their best

> interest is not the same thing. [italics added][1040]

Finally, another expression of the role of protection is the role of "fiduciary" described by the U.S. federal court judge interviewed:

> […] *we are a fiduciary for the class*. That's not a role that a judge is accustomed to having and suddenly you are more like a continental judge with an inquisitorial role and you have no adversaries to help you anymore because everybody is on the same side and telling you how wonderful the settlement is, etc., etc. So it's a very demanding role.[1041] [italics added]

In the end, the roles of protector, ombudsman (or ombudsperson) and fiduciary are all very similar. My interviews, however, suggested that the roles of ombudsman and fiduciary are stronger in impact and in reach than the role of protector. Indeed, aside from the words themselves, which do connote a greater involvement and more important responsibilities of the settlement judge, the interviews of the self-described "protectors" left me with a strong impression that they felt less responsible toward class members than the self-described ombudsmen and fiduciary judges, an impression justified by much more than the mere intrinsic strength of the words.

[1040] Interview No. 10.

[1041] Interview No. 1.

d. Inquisitorial Judges

In the course of the interviews, I broached the issue of whether the judges actually felt like they were acting inquisitorially at the hearing, and/or whether they felt they should be acting as such. I considered that acting inquisitorially meant essentially taking the lead of the hearing, in the sense of seriously questioning the deal and counsel's arguments (as opposed to merely asking questions). I also considered that the inquisitorial judge is not one who begins the analysis by presuming the settlement's fairness. In fact, as will be further discussed in my conclusion, what prevents judges from being more inquisitorial is the fact that most of them presume that the settlement is the best option for the members, that if it was agreed to by all, then it "*must* be fair". This attitude is problematic.

My evaluation of the inquisitorial tendencies of the judges interviewed was done after reviewing each of the judges' description of their process of approval, of their attitudes, preferences and philosophy of review and approval, as well as after a thorough review of their description of the settlement judge's role.

That being said, I present my description of the data in Table VIII below. One category is the inquisitorial judge ("yes"); that is the judge described above who leads the settlement hearing, actively discussing the problematic issues, asking questions, and constantly challenging the proposed document. The second category is the category of judges who believe that they should be inquisitorial, but in practice are not (as appears from their candid responses, or the rest of the interview, in their description of the process being followed, for example).[1042] The third

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[1042] One example of a judge who falls in this category is the one who answered: " I don't know where I draw the distinction. I mean, I ask questions to try to satisfy myself

category is the category of judges who do not believe that they should be inquisitorial at that stage. One last column is included to indicate which judges I was not able to evaluate (N/A).

and if I'm not happy with the answer, it may become more adversarial as we go along!" See Interview No. 15. This judge clearly is unsure whether he falls in one or the other categories.

Table VIII: Inquisitorial Judges:

	No, But Thinks Should Be or Someone Else …	**Does Not Think Needs to Be**	**Yes**	**N/A**
1 : 2009-J-CL-BC-1	1	0	0	0
2 : 2009-J-CL-BC-2	1	0	0	0
3 : 2009-J-CL-BC-3	0	0	0	1
4 : 2009-J-CL-BC-4	1	0	0	0
5 : 2009-J-CL-BC-5	0	0	0	1
6 : 2009-J-CL-BC-6	1	0	0	0
7 : 2009-J-CL-O-1	1	0	0	0
8 : 2009-J-CL-O-2	1	0	0	0
9 : 2009-J-CL-O-3	1	0	0	0
10 : 2009-J-CL-O-4	1	0	0	0
11 : 2010-J-CL-O-5	1	0	0	0
12 : 2009-J-CC-QC-1	1	0	0	0
13 : 2009-J-CC-QC-2	0	1	0	0
14 : 2009-J-CC-QC-3	0	0	1	0
15 : 2009-J-CC-QC-4	0	0	1	0

16 : 2009-J-CC-QC-5	1	0	0	0
17 : 2010-J-CL-US-1 TOTAL :	0 11	0 1	1 3	0 2

This table about the tendencies of the judges interviewed to be inquisitorial was difficult to elaborate, and its analysis is, correspondingly, complex. To fill in the table, and place each of the judges interviewed in one of the stated categories, I thoroughly analyzed each of the transcripts for any and all indicia evidencing a more inquisitorial stance. In the end, two of the judges' interviews were harder to interpret, and for this reason, I was unable to assess whether they have an inquisitorial attitude regarding settlement approval. These two interviews are classified in the column entitled "N/A".

The great majority of the judges (11/17) interviewed indicated that they believe that judges should be inquisitorial at the settlement approval stage, but the remainder of their answers suggests that do not act as such and will prefer that someone else act as the inquisitor (such as a monitor, for example). Three (3) of the judges interviewed tended to have many of the characteristics and attitudes of inquisitorial judges at the settlement approval stage. Two (2) of these judges are from Quebec,[1043] and the other one is the U.S. federal court judge. Only one (1) judge felt that there was no need to be inquisitorial at the settlement approval stage. Interestingly,

[1043] One word of caution. I hesitated to qualify Interview 2009-J-CC-QC-3's approach as completely inquisitorial, because he mentioned that he does feel that his first reaction is to presume the deal to be a fair one. However, the rest of his responses and judicial attitude show a clear inclination toward leadership in the questions asked and strong challenges to counsels' arguments.

he nonetheless felt that he could ask the parties for additional evidence, and could challenge the parties, but only to the extent that this would not jeopardize the peace of settlement.[1044]

I have found in the interviews that the main reason why judges do not appear to act in an inquisitorial manner is because they find it difficult or uncomfortable to do so: "[…] it's so unlike us to have an inquisitorial role. I guess that's what makes it so uncomfortable. So let's give that one a 7, because I don't know that the Act actually puts that burden on us; but practically, how else we're gonna do it?"[1045] And, again, in the words of three other judges:

> [it] is not a comfortable role for adjudicative judges.[1046]
>
> Arguably, one should adopt an inquisitorial approach, but we're not trained to do that and you always feel it's rather hit and miss.[1047]
>
> We're not used to [the idea of being inquisitorial]. We're used to sitting there and listening to the arguments and then deciding which argument is the more persuasive. As I said, it's very difficult, and it's particularly difficult when the

[1044] See Interview No. 5.

[1045] Interview No. 12.

[1046] Interview No. 11.

[1047] Interview No. 9.

> settlement agreement is negotiated prior to certification because, you know, someone files a statement of claim, they then start talking and they come to a settlement agreement and they then ask me to certify for the purpose of the settlement. At certification, generally they won't give you much that's relevant to the merits. It's all very, very brief. So you come to the fairness hearing and you know nothing about the case, nothing about the merits of the case and you're supposed to put a dollar figure on the merits of the case. It's not easy. I'm more and more convinced that I should have used a monitor.[1048]

The idea of someone else being inquisitorial is, instead, appealing to the judges interviewed:

> [..] judges would probably prefer to have had somebody else…
>
> Q: Do that.
>
> R: …do that and take some comfort in it having done.
>
> […] the paradigm was an impartial adjudicator. Not a mediator, or an

[1048] Interview No. 9.

> inquisitor, but an adjudicator. To the extent that we take on a role of protecting the class as opposed to measuring whether the class has been protected would be a different role. I don't see myself as taking on the role of the class' protector. I simply measure whether or not the class has been protected, which I think is different.[1049]
>
> Q: Judges should prefer an inquisitorial role at that stage.
>
> R: Yeah. Unless, you see, if you employ a monitor, then you can get back into an adversarial posture, can't you, because then you've got the monitor saying, "this is what's wrong". Again, it depends on how you brief the monitor; but if you're saying to the monitor, "I want you to point out all the weaknesses in this thing", you're getting back into your adversarial mode where the judge is sitting there, weighing arguments on either side.[1050]

Several of the judges who were asked whether they agreed with having an inquisitorial stance responded that they were comfortable with asking a

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[1049] Interview No. 10.

[1050] Interview No. 9.

lot of questions ("Different people: different approaches. I felt very comfortable about asking questions. It's a process where I think to do the job that I felt had to be done, I had to ask a lot of questions."[1051]). This response suggests a misunderstanding by several of the judges about the true meaning of "inquisitorial", which refers to more than asking a lot of questions. I have considered that acting inquisitorially requires that in addition to feeling comfortable with asking a lot of questions, the judges take on a leading role at the hearing, relative to the evidence and testimonies.

The U.S. federal court judge whom I interviewed, by contrast, explained his role in ways that strongly suggest an inquisitorial attitude and style. As partly evidenced by the following extract from his interview:

> Well, at the simplest, *[being inquisitorial] means I don't accept the settlement at the beginning. There's no presumption in favour. Instead, I have to make an inquiry, which is both reading the papers carefully and assessing what they tell me, and then, as you've said, at that hearing pressing them with a number of questions about the settlement, about the amount.* Oftentimes, the difficulties of the settlement are not so much the amount but the plan of distribution. It be may, "easy" is the wrong word", but it may be easier to decide that the lump sum total is

[1051] Interview No. 8.

> appropriate as passing between the defendant or defendants and the plaintiffs, but then, determining the method of distribution may be a much more difficult element to deal with, and so it's pressing on that, it may be at some point suggesting that there have to be other lawyers involved because there are conflicting interests within the class, that *we'll be hearing from the objectors and thinking carefully about what they've said* and then it may just be saying, "I won't accept this element or that element, or it's too low, I won't accept it, you'll have to go back and see if you can get something else". *So it's just that constant attention and realising your responsibility*, and interestingly I think at least in the big cases, one of the useful controls is the media and the community because they tend to give attention to it and they will get quite upset if the lawyers get all the money or if they think it's not being appropriately handled. And so I think it's useful to see the light of day.[1052] [italics added]

[1052] Interview No. 1.

In Quebec, the judges interviewed generally tended to be welcoming to and enthusiastic about inquisitorial approaches. They described practices in which they appeared forthcoming, active, inquisitive, and challenging. Only one of these judges qualified himself as a "conciliator" and was more formally opposed to adopting an inquisitorial approach to settlement evaluations and approvals.

Interestingly, one Quebec judge explained that he perceives a cultural difference between Ontario and Quebec judges, explaining that, in his view,

> Ontario judges seem to take a lot of initiative in trying to understand proposed settlements. I heard Mr. Justice Winkler say at one time that he would hold preliminary settlement conferences with the lawyers to better understand the deal, ask questions, get ready for the hearing. When we talk fairness, well, that is a great way to ensure the fairness of the deal. Now, we may ask : does it preserve the fairness of the judicial process?[1053]

I, on the contrary, had the impression from the interviews conducted that the Quebec judges have practices and judicial attitudes that tend to be more inquisitorial at the settlement approval stage. My impression about the Quebec judges, however, was perhaps more firmly coloured by the very strong inquisitorial approaches of two of the judges interviewed. I highlight below certain extracts from these interviews:

[1053] Interview No. 6.

I want the representative to be adequate. Then, I ask "what are the comments? How many people communicated with you, and what do they ask you?" This is important to me. When we get to the approval stage, a notice will be published in the newspapers, or in other medias, and there will be a hearing on approval. I will ask the lawyers "have you had communications with class members? What kinds of questions do these members ask you? What do they tell you with regards to what they read on the notice, with regards to the settlement they have arrived at?" […] then, I try to get an idea of what will be the interests and concerns of the members. In the very large majority of the cases, we have very little information, so we have to try to step into the shoes of the members and anticipate what their concerns may be and how they might react. […]

We must prefer an inquisitorial approach. I am the judge, […] but it is difficult to be inquisitorial in our system. It is different in Europe, obviously, but in our system, when a judge is inquisitorial, the parties say "well why are you mingling into the

> case now?" or "aren't you judge going beyond your powers, and risking to render a judgment that is really fair and unbiased?" It is difficult because some people could think, through the questions we ask, that we are biased. That places us in a delicate situation. […]
>
> *I feel it is absolutely essential that we act inquisitorially at the settlement approval stage because otherwise, we will never be able to satisfy the fairness standard*."[1054]
>
> [I believe that judges should ask a lot of question and be inquisitorial.] *I have a busybody temperament, a curious temperament, a temperament where I want to make sure that I understand everything well*. I ask all sorts of questions, in all sorts of situations, I ask the witnesses questions. Once the lawyers are done with their examinations and counter-examinations, I say "now it's my turn, I have a few questions." And that also is interventionist, but it is a question of balance. […] sometimes I will ask questions and stumble upon a sensible or problematic issue. […] The lawyers will

[1054] Interview No. 4.

> tell me "mind your own business!" So *I believe judges in the future should be increasingly more interventionist, it is much better than the old passive judge; but this solution generates other problems*. […]
>
> We judges are human, and we love it when everything is harmonious, in accord, and unanimous. Judges find it really cumbersome to interpose and agressively intervene and challenge the lawyers. […] *The more interventionist judges have deep skins and are not afraid to get in trouble or to provoke trouble. […] I am one of these kinds of judges*. The lawyers are starting to give me the reputation of being really annoying. […] it is not a popularity contest. It is only a matter of doing your job. It is a question of beliefs. […] Sometimes I will be convinced that I am perfectly right and that I have before me lawyers that have not presented the truth, and that not one or the other has the interest to bring up, but the ball will fall in between these two players. [italics added][1055]

[1055] Interview No. 3.

Of course, the latter statement is from one of the judges interviewed who possesses many of the characteristics of inquisitorial judges. He is forthcoming, actively challenges the parties and lawyers, wants to find the truth, will address the witnesses and question their testimonies. But does he really take the lead as does the traditional, Continental, inquisitorial judge? Is he truly inquisitorial, or merely interventionist? I conclude that he has most of the characteristics of inquisitorial judges and hence, that he and two other judges have judicial styles and approaches that tend to be more inquisitorial than the others.

(3) Trends in Judicial Practices: the Weight of Time, the Timing of Judicial Involvement and the Multi-Jurisdictional Context

In this subsection I address several trends relating to the practices of settlement judges. The first, weight of time issue refers to whether the role of the judge has changed with time and is slowly entering a new era. The second, timing issue refers to the time-frame in the judge's involvement, and specifically asks: when does the role of the settlement judge begin and end? Does it end with the approval judgment, or at the end of distribution and implementation? The third, multi-jurisdictional issue will ask whether the judge's role differs in a context where different jurisdictions are involved, several settlement judges each separately evaluate the proposed settlement. Of course this settlement interestingly will have a very wide reach, and will concern individual class members located in more than one jurisdiction.

a. The Weight of Time

Several of the judges interviewed commented about the evolution of the judge's role in class action litigation and at the settlement approval stage.

The first series of comments concerned the role of the judge on a more general level, and essentially referred to the advent of case management and the need for a more active role: "it's not in our role traditionally to be proactive. I think judges are much more so today generally than they were."[1056] And in the opinion of another:

> *I think the traditional role of the judge* to sit back and let the adversaries have it out, then make a decision, *is sort of changing a little bit, because there are obviously competing factors here*: there's the question of the lack of information, like you say there's absent members. […] I think class actions are another situation where a judge would want to be a little more of a self-starter, a little more inquisitive, a little less taking things at face value. Not that you take things at face value, but in a trial you gotta decide the case on the evidence and it depends on what evidence is introduced by the parties; but in a settlement situation with class members, absent class members, you have to be alert to the fact that there may be interests that are not fully protected unless you jump into the fray a bit.[1057] [italics added]

[1056] Interview No. 7.

[1057] Interview No. 17.

In the opinion of one judge, judges will generally have to become increasingly more involved and interventionist in stance, due to the contemporary civil justice requirements of case management and proportionality:

> It is very, very clear that the judge of the next decade will be incredibly involved and interventionist, […] the legislator thinks that the judge must be a case manager and a manager of proportionality, and a manager of reasonableness, and the lawyers are not ready for this cultural change. Some judges were also slow to change, and […] not all judges are in favour of the more interventionist stance.[1058]

Other comments mentioned a new judicial attitude of being increasingly more cautious with proposed class settlements. More than one Quebec judge mentioned that judges were now being required to be increasingly aggressive and inquisitive toward proposed settlements. As one judge explained, "settlement approval is an evolving process. I think we ask more from judges than we used to. I predict that judges will become more demanding, especially in larger settlements.[1059]

Another judge interestingly noted that judges question class action outcomes more than they used to. He also worries about the fact that lawyers seem to be earning important fees at the class members' expense:

[1058] Interview No. 3.

[1059] Interview No. 6.

> We judges become preoccupied by cases in which the settlement was well drafted and thought-of, but the compensation mechanism is obviously problematic […] and we are left with a sour taste in our mouth because we see that the lawyers' pockets are full, while the members are not compensated. Then, we look at the settlement judge and we ask "why did you approve this deal?" […]
>
> We increasingly require end-of-distribution reports. They allow us to measure what was anticipated and what was realised. And it gives us a better measure of the work that was done… and the fact that the tribunal requires the report may in fact force the lawyers to work harder and better. […] but *that is a new trend*. We are waking up, aren't we? *We are being woken up and influenced by the American experience, because there is so much abuse there. We tell ourselves "if there is abuse in the U.S., there must be abuse here as well." So we develop mechanisms to address the abuse.*[1060] [italics added]

[1060] Interview No. 4.

b. The Timing of Judicial Involvement with Settlement

One issue of concern during the interviews was the timing of the judges' involvement with class action settlements. I asked the judges: when does your involvement with the settlement begin, and end? All of the judges interviewed indicated that they first become involved with a proposed settlement when informed of the conclusion of the deal and sent a copy of the agreement. I wondered, however, if they stayed involved beyond the judgment on approval (or denial). Would they, for example, remain involved until the settlement's administration or implementation, and in the claims process? I generally found that judges did not feel that they needed or were obliged to do so. The Quebec judges, however, mentioned that they remain seized of the case until all moneys have been paid out.[1061]

My data concerning this sub-topic cannot be steadily evaluated jurisdiction by jurisdiction because the issue was not systematically addressed in the interviews. Nonetheless, the comment reproduced below summarizes my impression of the position of common law judges regarding their involvement post-approval, and the fact that any procedures beyond approval are typically handled by a claims administrator:

> [I]n a more typical case, the administrator, after the settlement is approved, there is an administrator appointed. It could be an accounting firm like Deloitte's, we have Crawford Class Actions […] they do a lot

[1061] Interview No. 4.

> of this work. And they actually administer the settlement in the distribution of the monies… Different settlements demand different levels of proof of the class members as to whether they're entitled to monies. And they, not always but often, send a report to the court, and then at the end there's an order that releases the administrator from further responsibility and so on.[1062]

The judges interviewed generally appeared to prefer to have a system integrated and provided for in the settlement to ensure that the claims administration is conducted by another, independent entity:

> I think that [the claims administration] is an excellent way of ensuring that the settlement is beneficial for the parties, because for one thing, instead of just settling the common issues, we actually have a settlement that gives dollars and cents to each of the claimants. So there's some sort of a grid, there's a mechanism at least for moving this along. The court has stayed involved to ensure that things are carried out as expeditiously and effectively as possible. Those are excellent

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[1062] Interview No. 11.

> things to have built into the settlement package.[1063]
>
> R: Typically, if there are issues in the administration of the settlement, there'll be somebody who's been appointed on the outside and they have a dispute determination mechanism which is contemplated by the settlement documentation and approved by me as part of the settlement.
>
> Q: And would you obtain reports from that administrator?
>
> R: Yeah.[1064]

The appointment of a claims administrator is these judges' way to ensure that a neutral body is being placed in charge of compensation. Furthermore, when the claims administrators produce reports, the judges are able to control the administration and implementations, albeit indirectly.

In fact, I have also found that the judges interviewed would be in favour of keeping even better control of the post-approval activities by requiring one final report of the distribution of funds. As one judge indicated: "I think that would be very useful [to have a final report on the administration] because it's my understanding that in many cases, there's little takeout. And again, why are we paying a vast amount to lawyers,

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[1063] Interview No. 12.

[1064] Interview No. 8.

where ultimately very few people take up the amount at the end of the day?"[1065] Another judge explained that he did not systematically request reports on the implementation of settlements, but that he would in the future:

> Q: What about any involvement in the administration and implementation of the settlement? Do you ask to remain involved? Do you ask for reports? Are you given reports?
>
> R: I get a report generally speaking. I'm probably not as proactive as I should be. I mean, we're learning as we go along. I think what I should have done right from the outset is say, "I want a report by such and such a date. Even if you've got nothing to report by that date, give me a status report" […] But I haven't been doing that. […]
>
> R: You've taught me. In the future I will make sure always there's a report.[1066]

c. The Multi-Jurisdictional Context

One interesting question I asked relating to the role of the settlement judges is whether that role changes in a multi-jurisdictional class action context. As discussed in my first section to Chapter IV about statistics,

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[1065] Interview No. 12.

[1066] Interview No. 9.

multi-jurisdictional class actions are prevalent[1067], and most of the judges interviewed have handled cases of this kind, involving parallel or copy-cat class actions (in which the class action is first filed in the United States and "copied" in Canada, for example). I wondered whether the judges interviewed reacted differently in these kinds of cases, followed a different process, and/or perceived their role to be different from the one they usually hold in class action litigation.

Interestingly, when asked whether their role changes in a multi-jurisdictional context, the judges interviewed who had been involved in multi-jurisdictional cases responded negatively. In addition, when asked about the dynamics of simultaneous approval with judges from other jurisdictions, they indicated that they do not always end up discussing their case with the judges sitting on the same case in another jurisdiction. They indicated, however, that this kind of discussion was important and that communication is key. One judge aptly described the process followed in these kinds of settlements:

> At that time, there was a lot of contact more generally between the judges, there probably still is but now it's probably more in the form of conferences. But you could phone a judge and say, "what do you think about this". I also have some good friends who are federal district court judges who do class actions and I would

[1067] For instance, in Quebec, the internal statistics of the Quebec Superior Court are that the percentages of national class action cases gradually increased from 21% (from September 2007 until August 2008), to 36% (from September 2008 until August 2009), to an all-time high of 45% (from September 2009 until August 2010).

> get their views, often more in a hypothetical sense because they're not involved in the case here in Canada, they shouldn't be. But if you saw a precedent in the States and you wanted to understand it better, to call in, you know, the precedent was useful to you in your own thinking.[1068]

Other judges explained that in these kinds of cases, while they consider their colleagues' opinions, they do not feel "bound" by their decision:

> Q: So did you feel your role was different somehow? […]
>
> R: Well, I wasn't persuaded by the view that: "well, a Quebec judge, an Ontario judge has already approved this and you should too".
>
> Q: Have you actually been in a situation where you've talked to other judges about a case?
>
> R: I have on a couple. That certainly isn't a problem and I think we should be doing it more often to make sure that we know what's coming up. If we know that it's going in three provinces, my view is that we should be talking ahead of time, the

[1068] Interview No. 7.

> three judges, to make sure that we're not being whipsawed and that we get, not a joint judgment, but at least the views as to why something might be appropriate or inappropriate. We don't get a lot of time to look at these things.[1069]

Other judges, however, indicated that they felt more comfortable paying "lip service" to another's judgment about a proposed multi-jurisdictional settlement:

> […] *I adopted his thinking and his views and then I added maybe one or two things to that. That's all I did. I restricted it to that. So there was that kind of collaboration amongst the judge*s.[1070] [italics added]

> […] *the fact that somebody has already looked at it and approved it, you know, why am I not going to approve it*. Judge X in Ontario, he or she has looked at it and has concluded that this is reasonable and has written 25 pages or 30 pages saying why it all makes sense. Unless, I haven't been faced with it but it's almost like a patently unreasonable test, you know, if what that judge says, having approved it, makes pretty good sense and nobody has

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[1069] Interview No. 16.

[1070] Interview No. 2.

> appealed it, boy!, you gotta think long and hard as to why wouldn't I approve it.[1071] [italics added]

In a way consistent with their comments about the general loneliness of the approval process, the judges interviewed mentioned how much more comfortable they are when another has preliminarily evaluated – and judged – the proposed settlement's fairness:

> R. *I do feel more comfortable when there has been another judge and I've got the reasons for that judge, particularly if it's a judge who has had management*. So if you have somebody who, like in Ontario typically, has settled first and has had the order first, if you've got somebody who's handled the case throughout, then I would feel more comfortable in dealing with the settlement in those circumstances.
>
> Q: *Do you feel that you still have discretion to disapprove?*
>
> *R: Yes*. It's just a question of practically how do you get to the questions, how do you sense where the areas might be that you might be concerned about. But, yes, absolutely, if I were confident. If at the end of the day I looked at it and said, "I

[1071] Interview No. 15.

> don't think this is a good settlement because of X, Y or Z", then I would just refuse to approve it. Yes. I don't feel compelled to just rubberstamp what somebody else has done. It's just a question of how do you elicit that information. That's the difficulty.[1072] [italics added]

Nonetheless, one of the judges I interviewed interestingly cautioned that judges must be wary of differences in the applicable law and read the settlement provisions carefully before signing off on someone else's judgment.[1073]

In the end, I had the impression that the judges interviewed did not feel that their role and the settlement process in multi-jurisdictional settlements were much different from the context of approvals of local class settlements. Nonetheless, the judges interviewed generally did feel more constrained to decide the same way as other judges preliminarily seized of the same multi-jurisdictional settlement, and they did feel more comfortable approving settlements when other judges have previously evaluated that same settlement.

This tendency for judges to feel more confident when others have previously evaluated the multi-jurisdictional settlement's fairness – and ultimately follow into that same decision – is problematic. There is a tendency toward increasingly more multi-jurisdictional class action

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[1072] Interview No. 12.

[1073] Interview No. 5.

filings, a sign of globalization, of cases getting increasingly larger and more complex, but also of the opportunity felt by lawyers to easily replicate existing filings from other jurisdictions and be awared fees. The admission by judges that they tend to follow-in to their colleagues' steps is worrisome because it encourages increasingly more approvals, and rubberstamped adjudication in a context where lawyers already feel that approvals – and lawyer fees – are easy to obtain.

Conclusion on Settlement Actors and Judges

This subsection on the settlement actors and judges has been most instructive. It has served to demonstrate that the majority of the judges interviewed question the representation by representatives in terms of the function of the representative and the extent of his or her involvement with class members. As for the representation by counsel, the interviews suggested that judges tend to rely upon counsel representation, but that they are unsure what the relationship between counsel and members really entails.

The interviews have also helped reveal that judges will generally not hesitate to challenge proposed settlements, but only when they see red flags indicating unfairness. They will otherwise approve the settlements without challenging them any further. The Quebec judges interviewed appear to have a tendency to question class settlements more aggressively and act more inquisitorially. Moreover, my interviews have shown that the great majority of the judges interviewed are adjudicators when it comes to settlement approval. The negotiators and conciliators are very few. None of the B.C. judges interviewed fit into any of these two categories. As for the role of protection, the majority of the judges

interviewed agree that they must be and act as protectors of absent class members, but few know exactly how to act as such. The protector judges I interviewed were from Quebec and the U.S. federal court (unfortunately, since I only interviewed one American judge, this conclusion has a severe limitation).

Finally, parallels may be drawn between my findings about the perceived role of the settlement judge and the following table (Table IX), which relates the four jurisdictions and the judges' perception of what constitutes fairness in civil procedure. This table presents the judicial priorities and philosophies of the judges interviewed relative to fairness as a civil justice objective, in view of providing a clearer understanding of the various approaches to judging settlement fairness.

The first category of the table includes judges who believe that fairness is an intuitive process. They will be judges who throughout the interviews said "I wouldn't really know, would I", or "the process is very intuitive", or "fairness is so subjective", etc. The second category of judges includes those who believe that the fairness of a civil procedure or justice system depends on whether people were given a chance to come to court. It is the "day in court ideal", the ideal which requires that even the poor have access to the system. Giving people the chance to get compensated – in that case through the class settlement outcome – is the ultimate fairness objective for these judges. The third category of judges includes those who believe that fairness depends on the process that was followed, on whether the representation of class members was adequate, for instance, or on whether the notices were appropriate, etc. These judges will place great importance on such process issues and a fair settlement will be one which was first, concluded in good faith by adequate representatives acting in the best interest of the members. The fourth category of judges

includes those who believe that fairness depends on the outcome of the deal, and the compensation that class members will ultimately obtain, in dollar amounts. These judges focus on more substantive issues than the third category of judges.

Table IX: Perception of Fairness in Civil Procedure:

	Intuitive Process	"Day in Court" Ideal	Process-Based Approach	Outcome-Based Approach
1 : 2009-J-CL-BC-1	1	0	0	0
2 : 2009-J-CL-BC-2	0	0	0	1
3 : 2009-J-CL-BC-3	0	0	0	1
4 : 2009-J-CL-BC-4	0	0	0	1
5 : 2009-J-CL-BC-5	0	0	0	1
6 : 2009-J-CL-BC-6	1	0	0	0
7 : 2009-J-CL-O-1	1	0	0	0
8 : 2009-J-CL-O-2	0	0	1	0
9 : 2009-J-CL-O-3	0	0	0	1
10 : 2009-J-CL-O-4	0	1	0	0
11 : 2010-J-CL-O-5	0	0	0	1
12 : 2009-J-CC-QC-1	0	0	0	1
13 : 2009-J-CC-QC-2	0	1	0	0
14 : 2009-J-CC-QC-3	0	1	0	0
15 : 2009-J-CC-QC-4	0	1	0	0
16 : 2009-J-CC-QC-5	0	0	1	0

17 : 2010-J-CL-US-1	0	0	0	1
TOTAL :	3	4	2	8

According to this table, the majority of the judges interviewed are primarily concerned with the outcome of the class action litigation, and on whether the members are ultimately being compensated, and if so, how much they are getting. For them, fairness depends on compensation, on dollar amounts, on the "deal". The majority of the B.C. judges (4/6) interviewed appears to be focused on the outcome of a procedure, of the settlement. Two of the Ontario judges and the American judge share that concern, while the others have varying concerns. The Quebec judges interviewed, interestingly, have a majority of judges (3/5) focusing on the access to justice ideal, a very strong ideal in line with the social justice approach of the civil justice system of Quebec. These results are consistent with the characteristics of the judges according to jurisdiction, as is further outlined above.

Accordingly, two interesting parallels may be drawn between the impressions of Table IX and the rest of my data concerning the role of the settlement judge. First, the more inquisitorial judges tend to have day-in-court ideals and attitudes of protection of the class members' interests. This correlation is present mostly in the interviews of the Quebec judges. Second, typically adjudicatory judges who feel the need to protect but are unsure how to do so also tend to be ones who believe that fairness strongly depends on the outcome of civil litigation and settlement.

Other parallels will be drawn in the next subsection between the judges' ideals of fairness and the settlement fairness standard.

d. Class Action Settlement Fairness

i. Review of the Applicable Law

In Chapter III, I critically reviewed the class action settlement fairness tests, standards and factors applicable in each of my target jurisdictions. I explained that judges must approve North American class action settlements to make them effective, and that they must do so according to a standard of fairness, reasonableness and adequacy, supported by a list of factors or considerations of fairness. I asked, "how does a judge evaluate whether a class action settlement is 'fair' or 'unfair' to class members? What standard and factors are appropriate and useful to a 'fairness' review? How are procedural fairness and substantive fairness respected throughout the review process?"

In my four focus jurisdictions, the "fair, reasonable and adequate" standard is supported by a list of factors which I have summarized, for the thesis' purposes, as the "seven factors fairness test". This test includes:

a) a judicial risk analysis: the likelihood of recovery, or likelihood of success on the merits, weighed against the amount and form of settlement relief;

b) the future expense, complexity and likely duration of litigation;

c) the class reaction: the number and nature of objections;

d) the recommendation and experience of

counsel and opinion of interested persons;

e) the adequacy of representation: good faith and absence of collusion;

f) discovery evidence sufficient for "effective representation"; and

g) adequacy of notice of proposed settlement to absent class members.

In Chapter III, I also explained these factors, and its two major components. Substantive fairness requires that the judge fully understand the deal's provisions, in such a way to evaluate objectively whether the claim would succeed at trial and how much the members would be awarded in the end. Procedural fairness requires that the judge carefully examine the process by which the settlement was negotiated and the compromise reached. Courts then review the representative's involvement in the negotiations and verify that the settlement resulted from arm's length negotiations without collusion or coercion.

In a second larger subsection of Chapter III, I explained why I found the current standard of settlement fairness inadequate. First, I argued that there is a strong public policy and judicial preference for class settlements, and that the combination of this public policy, of the weight given to class counsel's recommendations regarding the proposed settlement, and of the "range of reasonableness" rule had notably led to quasi-automatic approvals of class settlements and lesser quality judgments on settlement approval. Second, I argued that the inconsistent uses and applications of the procedural and substantive fairness lines of inquiry bring uncertainty

of outcome in class action settlements. Third, I argued that the role of the settlement judge is ill-adapted to the task of settlement approval.

ii. Adequacy of the Settlement Fairness Standard

One of my project's very first hypotheses was that the existing standard of fairness applicable at the settlement approval stage is unclear or inadequate to properly support judges in their evaluation of the fairness of North American settlements. Interestingly, the interviews I conducted of the seventeen judges do not, on their face, support this proposition. Indeed, I asked eleven (11) of the seventeen (17) judges interviewed from each of the four jurisdictions to evaluate from 1 to 10 what they thought about my initial belief that the standard is unclear or inadequate. They were directed to answer "10" for "completely agree" and "1" for "completely disagree". My exact proposition was: "The standard of fairness and reasonableness provided in the case law is adequate."

Eight (8) judges answered from 7 to 10, while three (3) answered below five (5), indicating that the great majority consider the settlement fairness standard to be adequate. Another three (3) judges generally expressed their agreement with the standard of fairness throughout their interview, and are hence part of the group of judges who believe that the standard is adequate. Table X below groups the results of this query, and in this chart, the last column indicates the number of judges who were not asked what they thought about the fairness standard and did not express an opinion on that subject.

Table X: Opinions Regarding Clarity and Appropriateness of Standard of Class Settlement Fairness:

	Believes Standard Unclear or Inadequate	**Believes Standard Clear and Adequate**	**N/A (Judge Expressed no Opinion)**
1 : 2009-J-CL-BC-1	0	1	0
2 : 2009-J-CL-BC-2	0	1	0
3 : 2009-J-CL-BC-3	0	1	0
4 : 2009-J-CL-BC-4	0	0	1
5 : 2009-J-CL-BC-5	0	0	1
6 : 2009-J-CL-BC-6	1	0	0
7 : 2009-J-CL-O-1	1	0	0
8 : 2009-J-CL-O-2	0	1	0
9 : 2009-J-CL-O-3	0	1	0
10 : 2009-J-CL-O-4	0	1	0
11 : 2010-J-CL-O-5	1	0	0
12 : 2009-J-CC-QC-1	1	0	0
13 : 2009-J-CC-QC-2	0	1	0
14 : 2009-J-CC-QC-	0	1	0

3			
15 : 2009-J-CC-QC-4	0	1	0
16 : 2009-J-CC-QC-5	0	1	0
17 : 2010-J-CL-US-1	0	0	1
TOTAL :	4	10	3

On paper, the judges interviewed express a general agreement with the proposed standard, and state that they find it adequate. On a closer look at their answers, however, one notices that while they agree with the standard, the great majority of them believe that the role of the judge and judicial process of approval are difficult and/or problematic. As we will further explore, this may indicate that the standard is inappropriate to support the process of approval. Furthermore, as I will explain in this subsection, several of the judges interviewed indicate that the approval process is mostly "a question of feeling". This leads me to suggest, again, that perhaps the standard is inappropriate or inadequate to assist the judges.

I will first examine two of the negative answers. One Ontario judge stated that he thought the standard test was inadequate because "it's a very general, general test."[1074] Another judge, this time from British Columbia, mentioned that he thought the standard was inadequate because unclear: "I would like much more detail. I mean, yes, the standard of fairness and

[1074] Interview No. 11.

reasonableness, yeah, those are great standards; but what do they mean when I actually have to come to apply them? So I would want more detail. »[1075]

One judge actually explained that the objective behind the existence of the fairness tests and factors is to support the very intuitive fairness decisions of reviewing judges:

> […] whenever a court has to deal with something as amorphous as what's fair and reasonable, they always try to list a bunch of criteria or characteristics of what's a fair and reasonable settlement, so they can analyse their thinking, they can organise their thinking, because sometimes, unless you do it in that way, you don't create the framework to be able to make a fair decision. It's too much of a gut reaction.[1076]

Thus, this testimony expressed a desire for a proper legal framework, in the form of fairness factors, to organize the judges' inevitably subjective decision.

Several of the judges interviewed mentioned that they believe the factors are helpful and appropriate. One judge interestingly agreed with having a list of factors, but opined that the factors should not be recited or used blindly, as that reciting exercise is useless:

[1075] Interview No. 12.

[1076] Interview No. 17.

> Some of the factors become boilerplate and are recited by rote. […]my comments were, I think, probably designed to point out that you can't get carried away with these factors and you do need to look at the particular circumstances of every case in order to find out what is fair and reasonable. But they will come forward in every case. *In every case, you get this boilerplate. They will justify the settlement on the basis of those criteria, and it's unfortunate. I mean, they feel obliged to do it, and apart from the fact […] apart from the fact that it gets to be tediously boring to read the same stuff, it actually is useless*, […] you get this tedious recitation of the factors that have nothing to do with a particular case and you go through this motion, and it's boring to listen to, it's boring to write and it's meaningless.[1077] [italics added]

This judge would prefer to disregard the list of principles, and leave it open for judges to decide fairness without mandatory reference to the list:

> I think that people should get back to the core principles and say, "what do I need to do in the circumstances of this case to prove that it's fair and reasonable and in

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[1077] Interview No. 10.

> the best interest of the class to approve the settlement", not go through a list of formula and not feel obliged to go through a list of formula because in some cases I think you could justify the case is fair and reasonable without regard to any of that formula and you might thereby identify a new factor that could be relevant.[1078]

Another judge actually mentioned following the latter approach and not sticking closely to the list of factors. He instead welcomes other indicators of fairness that may not be on the list:

> […] typically, by the time I would see a settlement, all that I'm doing is being asked to approve this particular structure. So when I give reasons, all I'm going to do is address the factors that the Act requires me to address. That doesn't mean I haven't thought about other things.[1079]

Another of the judges interviewed aptly explained that lists of factors are often used to organize and support fairness decisions that could otherwise be directed by intuition:

> But at the end of the day, you can list a whole bunch of factors, some relate to

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[1078] Interview No. 10.

[1079] Interview No. 12.

> process, some relate to the merits, all these sort of factors and on and on as they're listed in *Dabbs* in these various cases. Then you look at it and, like we do in so much of our work, it's that feeling that you get in your stomach: oh yeah, this feels right. That sounds kind of corny, but it's actually true. I mean, *that's why various tests for judicial discretion have these factors. They're just sort of making sure you don't check how you feel before you've done all the work. So you list these things and it helps you make sure that you're considering everything before you've reached that conclusion*.[1080] [italics added]

Interestingly, he explains that he uses the fairness factors to drive, so to speak, his "feeling of fairness". This testimony further supports my proposition that the fairness factors are inadequate.

iii. What Convinces Judges of Settlement Fairness

Before describing the data found on that topic, I find useful to discuss here what elements the judges interviewed consider as priorities when they are handling class action settlement approvals. This categorization helps better understand how the judges interviewed perceive fairness issues in class action settlement contexts. When I reviewed the interview transcripts, I found that the judges appear to have varying priorities that

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[1080] Interview No. 17.

can be categorized as follows (which categories are presented in Table XI below):

The first category is the category of judges who focus on the costs and efficiency of process and procedure. They are concerned with how much it costs the parties to settle, how much time it takes them to negotiate and conclude the agreement, how much time is spent to evaluate fairness at the hearing. For these judges, fairness and reasonableness is evaluated mostly with regards to costs. When I ask them how they decide whether to approve or not, they tell me that they prioritize the following issues: how much are the members getting? How much would it cost to go to trial? Etc.

The second category of judges includes those who focus on the fairness of the deal for class members. They are ones who listen closely to what objectors have to say, prefer to speak to the representative directly, and evaluate fairness as regards to the "reasonable member" (a concept I further describe below). They are not concerned with the defendant, or with class action law objectives. They will be comfortable with the issuance of a final report of administration, mostly because they want to make sure that the ultimate beneficiaries get compensated.

The third category of judges includes the ones who believe that the priority should be the protection of the public, at a greater level. They are very concerned with respecting the class action objective of behaviour modification (and deterrence). One such judge I interviewed explained that his first and foremost judicial priority is to see the defendants "pay" first, before anything else![1081] These judges are concerned with the

[1081] Interview No. 5.

appearance of fairness, with what people will believe or perceive of the process followed or of the outcome.

Of course, I have found that certain of the judges interviewed could form part of more than one category. They could indeed have more than one judicial priority, but this chart aims to present the primary or most important priority expressed by the judges in the course of their interviews.

Table XI: Judicial Priorites in Class Action Settlement Fairness Evaluation:

	Costs and Efficiency	Fairness to Members	Fairness to Public	Unassigned
1 : 2009-J-CL-BC-1	1	0	0	0
2 : 2009-J-CL-BC-2	1	0	0	0
3 : 2009-J-CL-BC-3	0	0	0	1
4 : 2009-J-CL-BC-4	0	1	0	0
5 : 2009-J-CL-BC-5	1	0	0	0
6 : 2009-J-CL-BC-6	0	1	0	0
7 : 2009-J-CL-O-1	1	0	0	0
8 : 2009-J-CL-O-2	1	0	0	0
9 : 2009-J-CL-O-3	1	0	0	0
10 : 2009-J-CL-O-4	0	1	0	0
11 : 2010-J-CL-O-5	0	0	1	0
12 : 2009-J-CC-QC-1	1	0	0	0
13 : 2009-J-CC-QC-2	0	0	1	0
14 : 2009-J-CC-QC-3	0	1	0	0
15 : 2009-J-CC-QC-4	0	1	0	0

16 : 2009-J-CC-QC-5	1	0	0	0
17 : 2010-J-CL-US-1 TOTAL :	0 8	1 6	0 2	0 1

What this table evidences is that most of the judges interviewed (9/17 or 9/16[1082]) appear to have costs and efficiency as priorities in evaluating the fairness of proposed settlements. In each of the Canadian jurisdictions, equal numbers of judges interviewed are focused on costs and efficiency, and few are concerned primarily with the interests of the public. Hence, the priority ranked second in importance is the fairness to class members.

One reason behind these results is the need for judges to case manage class actions. Indeed, case management primarily aims and serves to reduce costs and bring efficiency to the class action system. All the judges interviewed, in all of my focus jurisdictions, have been trained as case managers and are encouraged by their court administrators to prioritize efficiency of process and results. The reason behind the second most important judicial priority – fairness to class members – is the impression and belief among the judges interviewed, that they have a role of protection of class action members in the class action context generally, hence the priority given to the fairness to class members.[1083]

Nevertheless, when one refers back to the differences in judicial attitudes and practices in the target jurisdictions, one first notices that the majority

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[1082] If I exclude the judge whose results could not be ascertained.

[1083] Of course the responses given by the judges are also influenced by their knowledge of the applicable law in their province/state. Accordingly, the desire and priority to protect the class members originates from the caselaw and doctrine described above in Chapter II (in the subsection about the judge's role), and is strong enough to influence the judges' responses, at least in part.

of the B.C. and Ontario judges interviewed (3/5 in each case) believe that costs and efficiency are the most important priority. In Quebec, the majority of the judges (3/5) interviewed believe that attention should primarily be given to fairness of the system to the public and to the members. Even the one judge interviewed who prioritizes fairness to the public adamantly argues in favour of making sure that the defendants pay for what they have done, in a way to benefit the public of course, but also the plaintiffs and class members. Hence, what the majority of the Quebec judges interviewed are saying is that they focus, in class action litigation, on making sure that the class action members are protected, an impression consistent with the one provided in Table VII.

I now turn to the description of the data regarding the reasons supporting the decision of approval. I asked the judges interviewed "What convinces you of the fairness and reasonableness of a proposed settlement?" The idea behind the question was to find out about their personal approach to fairness, their opinion about the fairness criteria of each of the jurisdictions, and ultimately, their general attitude towards proposed settlements.

Reviewing the differences in approach jurisdiction by jurisdiction, I found that the British Columbia judges I interviewed appeared to prefer to strongly rely on the evidence and the representations made by counsel, and would review the agreement for problematic elements or "red flags" signalling unfairness:

> Well, I think to a certain extent it depends on the evidence before me and what the representations are that are made and when you look at it, does anything jump

> out at you and say, hold it, there's something fundamentally wrong here. I mean, it's hard to do more than that. You may have some pointed questions.
>
> […] you're looking for red flags that somehow or other, this doesn't pass the smell test […] you're certainly relying on counsels' opinion to a certain extent, and it's difficult sometimes because to a certain extent the only person really interested in the settlement, who's gonna get anything out of it, is counsel.[1084]

Another approach of the B.C. judges interviewed is to first verify that representation of the class members is adequate and second, to rely on the representations then made by the representatives. It is an approach that focuses on the safeguards and adequacy of representation. One judge clearly highlighted this concern with representation of the class members by stating: "So my concern always is: is it really fair, and particularly in class actions where there's somebody who isn't represented, is this the best result for them, is this truly a fair result?[1085] This approach is further described in the following interview extract:

> Well, it's very much driven by the parties. In a particular case, I suppose my prime concern was and will always be are the lawyers really looking out for everybody

[1084] Interview No. 15. For another example of that approach, see Interview No. 12.

[1085] Interview No. 12.

> involved. […] I was very concerned about these other people that weren't going to be sharing. So I guess my approach in terms of fairness would be to try and look at the breadth of the class and worry about it being too driven by the class with the biggest claim, and so I would worry about the people with a more minor claim.[1086]

The B.C. judges also recognize that deciding whether the settlement is fair or unfair is a highly imperfect exercise:

> […] *to a great extent you're relying upon what counsel presents to you and it seems in many cases that the plaintiffs and the defendants come together and say, "we think this is a reasonable package"*. […] If the submission appears to make sense, then one is implying to act on it, because without trying the issue, with the class being as diffused as they are, *I think you're really pretty much in the hands of counsel and relying on them to ensure that they've done their job*. Plaintiffs know how much they think the class can get, or how much they've been able to squeeze out of the defendants and the defendants know how

[1086] Interview No. 14.

> much they're prepared to pay. *And does it represent full compensation to the plaintiffs? Who knows. I don't know that there's any way of knowing.* It's not a pure science by any stretch of the imagination. […] I remember looking at all the material and deciding, well, this is the best we're gonna get. […] you have to ask yourself, well, was the result fair? That's pretty tough to measure, isn't it? I mean, *you do the best you can*.[1087] [italics added]

In the words of another B.C. judge I interviewed:

> Typically there would be evidence, you know, this is the number of claims, this is the amount of the claim. […] You have this big picture of how much it could possibly be, what the chances of success are, what the cost of getting there is, and then I look at the bottom line and say, okay, is this reasonable, is this fair in the circumstances. And if it's within the realm of something that I consider to be reasonable, then I say, okay, *it's probably fair*.[1088] [italics added]

[1087] Interview No. 13.

[1088] Interview No. 12.

In Ontario, the judges interviewed generally appeared to evaluate fairness by relying primarily on the factors, and secondarily, on arguments made by counsel and the adequacy of their representation of the class members. As one judge explained, the judge is not placed in a box when he reviews the proposed settlement. He will look at the factors, hear the arguments, and then they decide. It is a very pragmatic approach, as evidenced by this extract:

> Well, in a strictly literal sense, as I said there's sort of a list of factors that come out of the case law. […] I don't think I can say that there's any box that you put yourself in when you're looking at a settlement. You do look at the factors; usually the lawyers who are advocating, the plaintiff's lawyers who are putting before you a request for settlement approval, have laid it all out and have indicated why they think the settlement is fair and reasonable and in the best interest of the class and you just do the best you can in terms of trying to analyse whether it is or it isn't.[1089]

Another judge explained that he is "most convinced" by the negotiating process that leads to the settlement. He attempts to rely not exclusively on the factors, arguing instead that the negotiations are where the secret of settlement fairness lies:

[1089] Interview No. 11.

I suppose *I'm most convinced of the reasonableness of the settlement by virtue of the negotiating process that leads to it. I do rely on the material and I do rely on the factors*. Some of the factors become boilerplate and are recited by rote. I mean, it has some awkwardness in it;

[…] I'm told as a part of the settlement negotiation approval process, that there were settlement negotiations and sometimes I actually gain some insight to the extent of the settlement negotiations because the settlement approval may come with the fee approval process, so you have some understanding of the number of hours that were engaged with respect to some things. But by the process, I meant [that] I know that there is a process in which the plaintiffs, […] wish to get as much money as they can and the defendants wish to pay as little as they can. And so, one can anticipate genuine hard bargaining in the circumstances. […]. And of course it also depends on the point in time when the parties entered into settlement negotiations. If they entered into settlement negotiations prediscovery, they will have less information about the

> damage qualifications than they would if they had entered into it after a full discovery. It also depends on the nature of how the certification hearing went, because if the certification hearing had a major focus on liability issues, […] then you'll have a better reading on what the potential is.[1090] [italics added]

For yet another Ontario judge, fairness depends on a careful balancing of all the factors, and listening to his feelings:

> […] it's a question of weighing, of balancing all those factors, the risks of litigation, competence of counsel come into it. […] It's a balancing function.
>
> […]I make them take me all the way through it. […] I say, "you gotta persuade me, so exercise your powers of advocacy and persuade me that this is good. You know what the test is that I've got to apply, you address it". And you get a feel for it. Even though you haven't got counsel on the other side saying, "that's all rubbish, it doesn't apply", you get a feel for just how convincing it is. But then there are always nagging questions, you know, have they told me everything? Are

[1090] Interview No. 10.

> the litigation risks really as serious as they said they were? […][1091]

One of the Ontario judges interviewed explained that he prefers a simpler approach where he looks at the factors and evaluates them procedurally and substantively:

> Well, there's a bunch of criteria you look at, but … First of all, you look at it. In certain cases, you know it was a very hard-fought negotiation and if you can get comfortable that counsel is not trying to get out, that counsel has got a motivation to get the best deal possible and that counsel's economic interest is aligned with the class at that point, then you've got the protection of in effect sort of an adversarial arrangement where people have negotiated and it's been hard fought and you look at what mediations they've gone through and all the steps they've gone through. So that is helpful. And then, separate and apart from that, you probably would want to have some understanding of the merits or the issues of what's involved and the cost of going forward and counsel probably giving you evidence about other settlements, other

[1091] Interview No. 9.

> amounts, like transactions and things like that. […][1092]

The U.S. federal judge I interviewed described his decision-making process in a way similar to the Ontario judges, basing the evaluation of fairness on the careful analysis of each of the factors in the relevant list of factors:

> What convinces me. You know, it's not like a sudden eureka principle. Instead *it's a process of going through all of the factors that our appellate courts have laid out for us to consider*. So *I look at other comparable cases; if they've gone to trial, what have they recovered; if they settled, what have they recovered. I look at the amount of the claim, I look at what the statutory penalties might be in terms of are they treble damages or are they single damages*. Oftentimes, in big cases I'll have economists who will be testifying and valuing what the recovery might be; I will look at what kind of discovery has taken place in terms of whether the plaintiffs thoroughly understand their case; I'll try to look at the hazards, although I realize at that point that the lawyers will be, on both sides, telling me how risky the case was and therefore why

[1092] Interview No. 8.

it's such a good settlement. But *it's really just sort of plodding my way through all of those things to decide whether the total number seems roughly appropriate.* And, you know, even if I decide that the range of what would be appropriate is gonna be used, because in any settlement, as you know there's never an exactly correct number, it's a range, and then there's the distribution question which is: okay, if that's a good total number, what about the plan of distribution? Is all of the money going to be distributed in equal amounts? Is there going to be some left over and then we'll have to use cy-pres, and if so, who is that going to be, are there going to be striations in the class, some people get more than others, what kind of a place procedure are you going to have and what's it going to cost? Is it going to end up taking a third of the class recovery to do the notice and the administration and do the follow up? So there's just no eureka principle. *It's just going through it one by one* and probably, at the end of the day, when I write my result, I may be approving some things and disapproving others, and here we're not allowed to dictate what goes in because it's still a

> settlement; all I can do is say, "I disapprove it" and then wait and see if they come back and correct it. [1093] [italics added]

The Quebec judges interviewed, by contrast, do not appear to rely on the lists of fairness factors as much. They instead explain that they found their evaluation of fairness on their understanding of the deal and of whether the reasonable class member would want to share in it. To my question "what convinces you of the fairness and reasonableness of settlement?", one judge simply answered: "The deal is important. This, is what is most important. My understanding of the deal. […] Second, once we understand the deal, we have to ensure that the agreement is favourable to the members."[1094] Another judge similarly explained: "Listen, we read everything that is in the agreement, we try to understand. For me, the main question I ask myself regarding the proposed settlement is whether the settlement is interesting for the class member, whether he will want to participate in it."[1095] A third Quebec judge again reiterated the importance of understanding the compromise:

> There is a multitude, a sum of factors. But I base my determination of fairness on my most complete understanding of the file. It will be my evaluation of the possibility of gain in the class action. For me, that is fundamental. [A second element is the

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[1093] Interview No. 1.

[1094] Interview No. 6.

[1095] Interview No. 5.

> complexity of the evidence, which may cost so much to make that there will be no money left for the stakeholders.] […] and, in certain cases, […] another element of fairness is the lawyers' greed with regards to their fees, which affects me negatively when it comes to settlement approval.[1096]

Another of the judges interviewed clearly explained the angle from which he evaluates settlement fairness; the perspective of the class member: "I asked questions at the hearing, such as "if I were a class member, what would I want to know?" [1097] He also mentioned his concern for the appearance of settlement fairness: "I was also telling myself, what questions can I ask for people in the courtroom, in order for them to say 'Wow, that is a good question!'"[1098]

In a way similar to the concerns of Ontario judges, one of the Quebec judges expressed his concern with the negotiating process. For this judge to approve the deal, it has to "look good" and to evidently have been concluded after reasonable negotiations:

> Q. So what convinces you of the fairness and reasonableness of the proposed settlement?
>
> R: Usually I guess it would be the negotiating process that they'd gone

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[1096] Interview No. 4.

[1097] Interview No. 3.

[1098] Interview No. 3.

> through to reach a settlement. How did they get there; how long did it take; was it prolonged, and you get a bit of a picture of that just by looking at the fees, the time spent negotiating back and forth. That kind of thing. So that gives you degrees of comfort level.
>
> […] *sometimes you can look at a settlement, an arrangement, and you just say right off the top of your head, this looks good. This looks good.* Defendants are prepared to put a whole pile of money on the table, they've developed an arbitration process, they've developed an appeal process. *Just going through the agreement, you get the sense that this is something that didn't happen overnight*.[1099] [italics added]

Finally, one judge mentioned how important it is for him to consider the larger interests of society in the determination of fairness of settlement:

> I think we must first consider the wrong caused to class members […] Was people's trust wronged? You wronged people. Are people compensated in this settlement? Yes? Great. Of course, fair in the sense where there is an

[1099] Interview No. 2.

> acknowledgement of the wrong caused. […]
>
> Then, we must ask how much it is worth for each member? […] Generally, we split the settlement amounts between the members. Is every member compensated? […] The system works because the public trusts the companies […] It is a little bit like give and take.[1100]

Having presented a summarized description of the results of the interviews, and extracts relating to the decision-making process of evaluating fairness, I present below a table that categorizes each of the interviewees' responses regarding their preferred approach to evaluation of settlement fairness. The first category includes the judges who evaluate settlement fairness based upon the standpoint of the reasonable class action member, whether this member is being compensated, and what he or she would think are the weaker or more problematic aspects of the proposed agreement. The second category includes judges who evaluate fairness based on the adequacy of representation by the representatives – mostly class counsel. These judges will tend to approve settlements that have been concluded on behalf of members who were well represented. In fact, these judges will also tend to be in a category of judges who more automatically approve settlements "on a hunch" or "rubberstamp" such settlements. The third category includes judges who evaluate fairness based on the lists of settlement factors applicable in their jurisdiction.

[1100] Interview No. 5.

Table XII: Preferred Approach to Evaluation of Settlement Fairness:

	According to Reasonable Member	**Balancing Representation and Safeguards**	**Evaluates According to the List of Fairness Factors**
1 : 2009-J-CL-BC-1	0	1	0
2 : 2009-J-CL-BC-2	0	1	0
3 : 2009-J-CL-BC-3	0	0	1
4 : 2009-J-CL-BC-4	0	1	0
5 : 2009-J-CL-BC-5	0	1	0
6 : 2009-J-CL-BC-6	0	0	1
7 : 2009-J-CL-O-1	0	0	1
8 : 2009-J-CL-O-2	0	0	1
9 : 2009-J-CL-O-3	0	1	0
10 : 2009-J-CL-O-4	0	1	0
11 : 2010-J-CL-O-5	0	1	0

12 : 2009-J-CC-QC-1	0	0	1
13 : 2009-J-CC-QC-2	1	0	0
14 : 2009-J-CC-QC-3	1	0	0
15 : 2009-J-CC-QC-4	1	0	0
16 : 2009-J-CC-QC-5	0	1	0
17 : 2010-J-CL-US-1 TOTAL:	0 3	0 8	1 6

Accordingly, what this table and my analysis of the interviews reveal is that the judges interviewed have differing approaches depending on their originating jurisdiction, which approaches lead to different evaluations of settlement fairness. The majority (8/17) of the judges interviewed appear to evaluate fairness by the adequacy of representation, while several of the other judges (6/17) evaluate the compromise based upon lists of fairness factors, without a proper evaluation of what the reasonable class member's opinion about the proposed settlement.

The interviews conducted revealed that the majority of the British Columbia judges interviewed rely strongly on the arguments made by counsel. If the representations made by the parties and by counsel appear

appropriate, these judges will tend to rely on what is presented to them and conclude to the deal's fairness. By contrast, the majority of the Ontario judges interviewed appears to rely principally on an evaluation of adequacy of representation. However, these judges also appeared to rely a lot on the lists of factors to evaluate settlement fairness and to decide whether to approve the agreement. In Quebec, the judges interviewed highlighted the effort required to first understand the document, the agreement. This understanding of the deal is what will convince them of the settlement's fairness, even before they refer to the fairness factors and lists of indicia of fairness. Hence, the lists of factors come second. What judges are concerned about is "what is the deal about?" and "would it benefit the reasonable member? What would the reasonable member think of this settlement?" Finally, the U.S. judge I interviewed had an approach similar to the Ontario judges' approach to fairness.

iv. Presuming Settlement Fairness

In the course of the interviews, one point I found interesting to explore was whether the judges interviewed presumed the proposed settlement's fairness before officially beginning their review of the agreement (for indicators of fairness). I asked the judges what they thought about the presumption of fairness, that is, this judicial attitude of considering the proposed settlement to be presumably fair, without having explored or scrutinized it further. I received several responses in favour of the presumption. Interestingly, many judges did not properly answer the question and instead explained how favourably they view settlements (over trial), more generally. For example, one judge responded: "[s]o anything you can settle without the necessity of spending weeks and months in trial, I'm in favour of it […]."[1101] Another judge stated:

> You know, people prefer settlements because of certainty. And settlements bring certainty. I don't know if there's a presumption. If it is a reasonable settlement, given what the issues are, I think generally speaking they are to be encouraged because otherwise somebody goes home with nothing and/or spends enormous sums of money to get to where you may be in any event.[1102]

[1101] Interview No. 16.

[1102] Interview No. 15.

And, again, another of the judges interviewed opined that the courts "should sanction the notion that a settlement of a dispute is always far better than having a third party impose a dispute resolution on them."[1103]

While the public has an interest in seeing cases settled, explained another judge, this does not mean that all cases should be settled. Settlements should be good ones, and hence, they should be properly reviewed before being approved:

> […] I suppose that the public has an interest in matters settling rather than going to litigation. I suppose that's true in some large sense. But having said that, it doesn't mean that every action should be settled because that simply makes no sense. Why take a bad settlement? Just because it's a settlement isn't a reason.[1104]

Several of the judges interviewed do believe that settlements are presumably fair. In the words of one judge, "from a settlement point of view, my guess is that probably the overwhelming majority of settlements are fine. You could say, "well, how would you know". That's a good question, but my feeling is that they probably are."[1105] Another judge justified the presumption of fairness by economics and court efficiency reasons:

[1103] Interview No. 11.

[1104] Interview No. 12.

[1105] Interview No. 10.

> I agree with the presumption of fairness for several reasons. First, because it brings a resolution of the litigation much earlier, on the condition that this solution is fair, reasonable and equitable in the circumstances, and that it frees up judicial resources to be able to hear cases that we must hear. Second, the settlement was agreed to following lengthy negotiations that began a long time ago. It takes a significant amount of time […] and that is why it is presumably fair.[1106]

Others explained that they agree with the presumption of fairness, but condition it on seeing proof of adequate representation by counsel. As one judge summarized: "you look very carefully at the role of counsel. I mean, was it truly at arm's length? That goes, I think, into the question of the role of counsel and the position of counsel."[1107] Another judge explained:

> I think that to the extent there is [a presumption of fairness], it would flow from the assumption that lawyers are going to do their best job to reach the best settlement for their client and the effect of that is a settlement that is in the range of reasonableness, and if everyone is fighting

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[1106] Interview No. 5.

[1107] Interview No. 8.

> hard for their clients and this is the result, then I think the presumption would make sense in those circumstances that it's reasonable. But if you take away one of those assumptions, if someone's not doing their best, then there shouldn't be any presumption.[1108]

Similarly, another of the judges interviewed explained that when "reputable counsel" recommend the deal, the presumption should stand:

> I've only thought of it as a presumption to the extent that if you've got good reputable counsel who are recommending it, I think that's worth something. I don't think it's worth necessarily an enormous amount. It's not an overwhelming presumption, it's something that, having looked at all the pros and cons and decided that it's one of these iffy things, then that's the sort of… – and of course I think that's how presumptions normally work, isn't it – it might tip the balance at the end of the day.[1109]

One of the judges interviewed explained how sceptical he is regarding settlements generally. He explained that he often has the impression that settling may not truly be the best option for the plaintiffs:

[1108] Interview No. 17.

[1109] Interview No. 9.

> […] very often, the defendants settle to not have to go through the whole process, but that if they pursued their case further, they could win their case. Sometimes I have the impression that class counsel and defence counsel make a deal without worrying about the representative's interest. […] I am not sure that it is always in the best interests of the plaintiffs to settle. But who am I to say this?[1110]

In fact, the majority of the Quebec judges that I interviewed were very open to proposed settlements, but they also were willing to question the proposed settlements:

> In the beginning, we have a preference for settlement, in part because we are avoiding a judicial debate, the risks of judicial debate, the costs of judicial debate. Therefore I always view settlements favourably. Now the difficulty that we have is that the people who come before us do not emphasise the more problematic elements of the proposed settlement. We are then forced to take the place of the lawyers and question the settlement.[1111]

[1110] Interview No. 6.

[1111] Interview No. 4.

Some of the judges interviewed take their preference for settlement one step further and explain, very candidly, that they do not want to stand in the way of settlement, and therefore, that they will tend to automatically approve proposed settlements. In the words of one judge:

> I'm very happy when parties to any case, be it a class action or otherwise, when they come to a negotiated settlement, represented by competent counsel. Again, as I say, I'm reluctant to get in the way of that kind of a settlement. We've established mediation and as judges we've been taught a little bit how to bring people together and talk their differences out over a table. So this is a tool we have that I think has worked quite well in getting resolution from cases, particularly in family matters and stuff like that. So if it's not public order, to me it's a very good thing.[1112]

Accordingly, the interviews conducted generally revealed a preference for settlement over trial, and a tendency to presume that the deal being proposed is fair. Very few of the judges interviewed are categorically against the presumption. The majority of the judges will at first presume the settlement to be fair, then scrutinize the settlement according to the lists of factors, excluding each and every possibility of unfairness to finally

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[1112] Interview No. 2.

conclude, ironically, how they really wanted to originally, that is, by approving the deal as presented.

v. Evaluating Settlement Fairness with a List of Factors

The judges interviewed were asked about the lists of factors that are applicable in each of their jurisdiction (which, as I have outlined above in Chapter III, are all similar in content), and which serve as indicators of fairness in a class action settlement approval context. I wanted, by my questions, to understand whether the judges follow and use these lists, and if and when they do, which factors are more important to them. I asked them to evaluate the importance of the factors from 1 to 10, "1" meaning "not very important" and "10" meaning "very important". I will herein describe first, their evaluation of the traditional factors, and second, their evaluation of factors that do not form part of the traditional lists of factors. The latter factors are indicators of fairness that have been mentioned or used in the caselaw of the target jurisdictions, but have not been directly included in the official lists of factors.

Of course, it is important to underscore, before we begin, the fact that while certain factors may appear more important in theory, they may be less important in practice, depending on the case at hand. Each of the factors being considered will have a relative importance depending on the case at hand. As explained by one judge:

> […] I think [the factors are] all important and what happens is, the particular factors, some will be present in one case and not in another. And you might have in one case where there's been significant communication over a long period of time

> with the class members about the negotiating process, where people have been kept informed and there's been a lot of communication, so that they understand it, they know what it's about and they can be at the hearing, saying, "we object" if that was the case. That's a factor which could be very important in one case and a factor which is not at all present in another case. If there was evidence of collusion, that would be fatal in just about every case. I mean, I think these factors are all important and each plays a different role in a different case.[1113]

And by this other judge:

> […] it's hard to relate it to… There's so many factors that come into play. I mean, there are some cases where the likelihood of recovery is problematic and there's others where it's slam dunk. There's others where, whether it's slam dunk or problematic, they involve tremendous costs and procedural difficulties.[1114]

[1113] Interview No. 8.

[1114] Interview No. 7.

Nonetheless, the interviews have revealed that the judges do place certain of the factors higher on their lists of factors, in a way that it becomes clear that these factors are more important in their fairness determination.

a. Traditional Fairness Factors

i. Adequacy of Notice of Proposed Settlement

Only seven (7) of the judges interviewed were asked to evaluate the importance of the adequacy of notice to their evaluation of fairness.[1115] They were again asked to give a numbered response, from 1 ("not very important") to 10 ("very important"). Three (3) of these judges evaluated the importance of this factor at more than 5, and four (4) thought that the adequacy of notices was not such an important indicator of fairness and they evaluated it as 5 or less. One judge suggested that the importance of the notice be evaluated on a sliding scale that varies from judge to judge: "I think that would be a sliding scale, depending upon what the impact is on the individual class member. Obviously, the more important the impact, the more important that they have appropriate notice."[1116]

While my statistical sampling is not significant enough to draw definite conclusions regarding the importance of the notice to fairness determination, I remark that the notices do not appear to be a determinative element of fairness for the judges interviewed. I would, however, require more evidence to support that proposal. Furthermore, the negative responses may be attributed to the fact that notices are

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[1115] As indicated above, there are variations in the questions I asked the judges. Because I wanted to encourage the judges' voluntary responses, I included open-ended questions, and sometimes varied my lists of questions to better suit the interviewee and circumstances of the interview.

[1116] Interview No. 15.

generally not very adequate or helpful, and remain perfectible, such that judges do not value them as much as they should.

ii. Adequacy of Representation

Thirteen (13) of the seventeen (17) judges interviewed were asked how to evaluate the importance of the following two factors: "adequacy of representation by the representative", and "adequacy of representation by counsel".

Table XIII: Importance of Adequacy of Representation by the Representative as an Indicator of Fairness:

Adequacy of Rep. by Representative	**≥5 (5 or more)**	**< 5 (less than 5)**
2009-J-CL-BC-1	X	
2009-J-CL-BC-2		X
2009-J-CL-BC-3	X	
2009-J-CL-BC-4	N/A	
2009-J-CL-BC-5	N/A	
2009-J-CL-BC-6	X	
2009-J-CL-O-1		X
2009-J-CL-O-2	X	
2009-J-CL-O-3	X	
2009-J-CL-O-4	N/A	
2010-J-CL-O-5	X	
2009-J-CC-QC-1	X	
2009-J-CC-QC-2	X	
2009-J-CC-QC-3	X	
2009-J-CC-QC-4	X	
2009-J-CC-QC-5	X	

2010-J-CL-US-1	N/A	
TOTAL :	11	2

Table XIV: Importance of Adequacy of Representation by Counsel as an Indicator of Fairness:

Adequacy of Rep. by Counsel	**≥5 (5 or more)**	**< 5(less than 5)**
2009-J-CL-BC-1	X	
2009-J-CL-BC-2	X	
2009-J-CL-BC-3	X	
2009-J-CL-BC-4	N/A	
2009-J-CL-BC-5	N/A	
2009-J-CL-BC-6	X	
2009-J-CL-O-1	X	
2009-J-CL-O-2	X	
2009-J-CL-O-3	X	
2009-J-CL-O-4	N/A	
2010-J-CL-O-5	X	
2009-J-CC-QC-1	X	
2009-J-CC-QC-2	X	
2009-J-CC-QC-3	X	

2009-J-CC-QC-4	X	
2009-J-CC-QC-5	X	
2010-J-CL-US-1 TOTAL :	N/A 13	 0

The latter two tables are instructive in demonstrating how concerned the judges interviewed are that representation of the members be adequate. When asked whether they valued the indicator of adequacy of representation by counsel, all the judges interviewed answered that they considered that factor as very important. When asked whether they would respond the same way vis-à-vis representation by the representative, only two judges responded negatively and gave numbers below 5.

I interpret these results as meaning that the judges interviewed perceive settlements concluded by well-represented plaintiffs as being fairer than ones concluded by plaintiffs who are not well-represented. I note, however, that in their responses, the adequacy of representation by the representative received slightly lower numbers, which could be interpreted as meaning that judges tend to believe that adequacy of representation by counsel is more important than adequacy by the representative. Considering the scepticism of judges toward the role of the representative, discussed above, the judges interviewed may feel that the representative's involvement in the settlement is not important enough to indicate settlement fairness.

Sensing the scepticism toward the role of the representative, I asked certain judges whether the representation by the representative should properly be evaluated at the settlement stage. On that issue, the judges

interviewed generally tended to respond that adequacy of representation should be verified at the certification stage, and that only pre-certification settlements should be accompanied by evidence of adequate representation:

> […], that's a more difficult question, but usually we have to consider on certification whether the representative plaintiff is an appropriate representative plaintiff. That's one of the criteria for certifying. So once you've done that, there's no reason for you to have to revisit that issue on settlement. So those are in the cases that have been certified. In the settlement proposals that come before you before certification, I think I would want to have some evidence as to the proposed representative plaintiff or punitive representative plaintiff and why they have given instructions to settle it, who they are, are they representative. I think I'd want to know something about those things. But only in those cases that have not previously been certified. When certified, I wouldn't inquire into that at all.[1117]

[1117] Interview No. 11.

iii. Likelihood of Recovery or Likelihood of Success on the Merits Weighed against Amount and Form of Relief, and Future Expenses

Every one of the thirteen (13) judges interviewed and asked to evaluate the importance of the "likelihood of recovery or likelihood of success on the merits weighed against the amount and form of relief", and the "future expenses" factors graded them at "7" or higher. I interpret these results as meaning that these two factors are very important to the judges in each jurisdiction. One caveat to my interpretation is the fact that judges actually attributed slightly lower numbers to the indicator of "future expenses", which may indicate that they value this indicator slightly less than the "likelihood" factor.

iv. Good Faith of the Parties and Absence of Collusion

Thirteen (13) of the judges interviewed were asked how to evaluate this factor. Twelve (12) judges answered that this was a significantly important factor while one (1) answered by grading the factor with less than 5, a grade that he justified by explaining that he can never see or know that the parties were in good faith or not. Generally, this factor was very highly regarded by the judges interviewed.

Two judges interestingly mentioned how hard it is to evaluate good faith and collusion: "If you could ever get to that, that would be 9. If you could ever find it? Yeah."[1118] Another stated: "That's a hard one to answer in the sense that: how do you know? So I would say you're assuming. I mean, if you could see collusion, then you'd know exactly what to do. So I would say it's a low factor: 4."[1119] Another judge was much more assertive

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[1118] Interview No. 12.

[1119] Interview No. 10.

regarding the importance of the factor: "If there was evidence of collusion, that would be fatal in just about every case."[1120] In the course of the interviews, I felt that for the judges interviewed, this factor felt naturally indicative of fairness, but not truly determinative, perhaps because none of the judges interviewed had ever considered the parties to be in bad faith, or seen collusion in any of their cases.

v. Discovery Evidence Sufficient for Adequate Representation

Discovery evidence sufficient for adequate representation is a factor that received unanimously positive responses from the judges interviewed. Each of the ten (10) judges I asked about that factor found that it deserved more than "7" as a grade. A few of the judges interviewed were more sceptical and wished to qualify their responses. For example, one judge stated: "[v]ery often, it's not discovery evidence. So it would be discovery evidence or sufficient information and that, I would put high: 8 or 9."[1121] Another explained that the importance of this factor varies, depending on the nature of the case:

> Well, once again it depends on the nature of the case and it also depends on the nature of what's happened in the case. As I say, if you get a full-blown certification hearing, you know, prediscovery where they really have at it, then the amount of discovery is zero, but the amount of

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[1120] Interview No. 8.

[1121] Interview No. 11.

> disclosure is comparable to what you would have on the discovery. Now, if you're talking about a freestanding discovery process associated with the settlement approval, I would say we rely on what's taken place already. The amount of evidence that you're given outside of the categories is small.[1122]

This variety in the types of cases considered leads another judge to perceiving the importance of this factor differently, depending on the file:

> Discovery evidence. It can be very important. Again, quantitatively, in very few cases I think I found it important. In some cases, they've said, "look, when we did discovery, our case disappeared. That's why we've got to settle for this miniscule amount". I had one of those cases quite recently. I thought it was a bad case right from the beginning on the merits, but the plaintiff was very keen on pushing it because he'd lost money personally. And it more or less collapsed after discovery and the defendant more or less said, "look, we'll give you this money to go away" and they settled on that basis. So very rarely in my experience has it been important. In some cases, it's been

[1122] Interview No. 10.

overwhelmingly important.[1123]

[1123] Interview No. 9.

vi. Reaction of the Class/Number of Objections

Is the reaction of the class, or number of objections factor important to the evaluation of settlement fairness by the judges interviewed? I conclude that it generally is not a fundamentally important or conclusive element of fairness for the judges interviewed, as a (small) majority of these judges answered that it either meant little or nothing to their evaluation of fairness, or that they had no opinion about it.

Fifteen (15) of the judges interviewed were asked how important this factor was in their fairness evaluation. Only five (5) of the judges interviewed answered that they believed it to be an important factor of fairness. Six (6) judges believed that the objections – number and essence if any – meant little or nothing in their evaluation of settlement fairness. Four (4) judges either had no opinion (did not know how to answer the question), were unsure how to interpret this factor, or felt that it had varying importance depending on the case. These results suggest that many judges do not regard that factor as critically important or determinative. However, the results may alternatively suggest that the factor simply is irrelevant or inapplicable due to absence of objections in the class action settlement cases these judges handled in their practices.

Table XV below summarizes the answers received for each of the interviews.

Table XV: Importance of Reaction of the Class/Presence and Number of Objections as Indicator of Fairness:

Fairness & Objections	**≥5 (5 or more)**	**<5 (less than 5)**	**N/A**
BC1	X		
BC2		X	
BC3			X
BC6		X	
O1		X	
O2		X	
O3		X	
O4			X
O5			X
QC1			X
QC2		X	
QC3	X		
QC4	X		
QC5	X		
2010-J-CL-US-1	X		

TOTAL :	5	6	4

Several of the responses I received regarding this indicator of fairness are also worth presenting. One judge rightly commented that the factor can have varying importance, like many of the other fairness factors: "[it] could be very important in one case and a factor which is not at all present in another case."[1124] Another judge evaluated at "6" the importance of class reaction. He explained that class members who object get a "free ride" because it does not cost them anything to object, and they want the plaintiff to carry on even though he or she may be made liable for costs:

> That's a bit cynical because notice is supposed to be one of the key elements of the system, but *so rarely do we have effective objections from… they're more angry objections. […] generally speaking, these things don't help.* You know, people seem to think that if you go to trial, you are going to win, […] They don't take into account that in our system, […] when it goes to trial, the representative plaintiff is at risk for costs. So you gotta factor that into the litigation risks. *The members of the class who object are getting a free ride because they'll never be liable for costs; but they are very insistent that the representative plaintiff carry on.* And if push came to shove, one

[1124] Interview No. 8.

> might offer the class members who are objecting the chance to become the representative plaintiff and let the original one off the hook.[1125] [italics added]

Certain judges were unsure how to respond, and ambivalent regarding the importance of objectors – or lack thereof. Below is an extract of an interesting portion of one of the interviews:

> Q: Is the fact of no objections an indicator of fairness, in your mind?
>
> R: I am not sure.
>
> Q: So it does not mean that much to you?
>
> R: Well, it either is an indicator of fairness, or an indicator that people do not read the notices
>
> Q: Or are not aware of the notices.
>
> R: But I don't want to say that it is not an indicator of fairness. I just don't know. But let's say that the criterion interests me: I will wonder "how come there are not more objectors?" […] It may or may not be because everyone agrees. Because concerned members often will not even be aware of the existence of the class action,

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[1125] Interview No. 9.

> or of the settlement or reasons for settlement. They often are unaware that they are members of a class. They will feel like they have won the lottery.[1126]

Another of the judges interviewed explained that he does consider the presence or absence of objections to be indicative of settlement fairness, but that these objections will tend to become more persuasive when there are more of them, or when they are more assertive:

> It's something to be taken into account. Whether it's gonna be persuasive or not, it's probably a question of really how many objections are there, how strident are they, is it to the point where there's a subclass where a lawyer comes in and claims to represent this subclass of people who don't want to be a part of the class action? Is there a provision in the settlement agreement for dissenters, people to step aside? What rights do they have to bring separate actions if they choose? These are issues that perhaps go to the fairness of a settlement, if the settlement agreement does not address the right of a dissenting class member to withdraw and bring suit, that kind of thing. If there's an attempt in the

[1126] Interview No. 6. For a similar statement see Interview No. 4.

> settlement agreement where anybody who falls within that definition is automatically covered willy-nilly, the objective being that the defendant doesn't want to have to defend any more of those types of suits, that could become problematic.[1127]

Objections, accordingly, have varying importance, in part due to the frequent inadequacy of notices:

> There are some [objections] that are less [important]. For example, the reaction of the class, typically you don't get much of a class reaction, so I don't put a lot of weight on that. I mean, I would if I got 100 people in, yelling and screaming at me. That would have a reaction. But typically, when you send it out, you don't get much response at all. So the fact that there are no objections does not give me a lot of comfort.[1128]

vii. Recommendation of Counsel

This subsection must be read in parallel with my previous subsection discussing the role of counsel. I will discuss my impression that counsel's opinion is very highly regarded by the judges interviewed at the fairness

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[1127] Interview No. 2.

[1128] Interview No. 1.

evaluation stage. Indeed, the great majority of the judges interviewed, in all the jurisdictions but the U.S. (and again, based on the one interview of a U.S. judge, which severely limits my impression), found that the recommendation of counsel is a very important factor. As for the recommendation of a third party or disinterested person, these results are discussed in my subsection on the monitor and the willingness of judges to welcome third party opinions about settlement fairness.

For the judges interviewed, the opinion of counsel is very important. Only one (1) of the twelve (12) judges interviewed and asked to evaluate the importance of this factor found this factor to be less important, and another felt that it depended on the case at hand. These results are consistent with my impression that the judges interviewed rely tremendously on the arguments made by counsel regarding the proposed settlement's fairness.

viii. Time of Negotiation of Counsel Fees and Amount of the Fees

Only a few of the judges interviewed were asked directly whether they believed that the time of negotiation of counsel fees and amount of the fees was an important factor of settlement fairness. They all responded that it was, but the sampling is not statistically significant enough to be able to draw strong impressions or conclusions regarding this factor. Hence, I will merely reproduce and comment a few interview extracts.

I also want to underscore the fact that the majority of the judges interviewed mentioned that they believe the issue of counsel fees is an important one. Some expressed distress at the tendency for abuse and the appearance of procedural unfairness to the public. Others explained that judges must always remember when approving settlements that there is

only one pot of money, and therefore, that fees and settlements are correlative and must be considered simultaneously:

> Well, I think you would just have to be quite aware that it's one pot. So I guess I would say 6 or 7. You have to have an awareness that… There are some cases where the fees are paid exclusive of the settlement funds. But in many, I would say most, they aren't and so you just have to have an awareness that it's one pot of money.[1129]

One judge wished to caution that settlements made conditional upon the approval of counsel fees are "entirely inappropriate":

> There are more and more class actions which are coming before us for settlement whereby the settlement includes a provision for fees and on the basis that if the fees aren't approved, then the settlement can't be approved. I've had two or three of them and I've balked against that. I think that's *entirely inappropriate and verging on unprofessional* because what it does is say, "unless our fees, which you can't deal with as to whether they're fair or not, are approved, then all these people who would be getting money won't get

[1129] Interview No. 11.

> any money". And I think that puts counsel in a position of conflict with their supposed clients. And therefore, I've done a couple of things. Sometimes I've just not approved them and on one occasion, what I did was approve the settlement, but I said that the funds that would ordinarily go to counsel would be held; in other words, let me give you a simple example of a settlement of 100 dollars with four dollars going to counsel. Rather than have counsel immediately get the four dollars and everybody else get the 96, I have said, "fine, send out the 96 and as to the four, it will be held until there can be a proper assessment of the fairness of that fee, and if the fee is subsequently reduced, then there will be additional monies available to go out to the class". Counsel didn't like that very much, but [too bad for] them![1130] [italics added]

Another judge importantly suggested that the fairest approach is to ensure that fees are paid once the distribution is made:

> The fee issue is a difficult issue for me. […] You're trying to make an economic determination of the harm done. If it's

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[1130] Interview No. 16.

> economic loss, it's easy to calculate; but where it's physical loss, it's like assessing damages in motor vehicle accidents: it's tough. Where the rubber hits the road, it seems to me, is when you start to talk about these very, very large fees that are being claimed by counsel, and they're being claimed in circumstances where the work hasn't been done, hasn't been completed.
>
> […] Well, is it appropriate for counsel to have their full fee when the job hasn't been done?
>
> […]I don't believe that they should be getting paid a great big chunk when the work hasn't been done and you don't know what the take up is going to be. So maybe the answer is give them some and then augment it depending on what happens down the road.[1131]

ix. Equal and Fair Treatment of Class Members

The equal and fair treatment of class members is a fairness factor that appears to be very highly regarded by the judges interviewed. I asked thirteen (13) of the judges interviewed how they felt about this factor, and they all answered with an "8" or above. The thirteen judges were

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[1131] Interview No. 13.

composed of: four B.C. judges, four Ontario judges and five Quebec judges. Having said that, certain of the judges interviewed felt that a fair treatment factor should be followed, instead of an equal treatment one:

> Fair treatment I think is important and equal treatment may not be the same. I had one related to a medical negligence case and there was a very complicated grid of who got what depending on what horrible consequences they'd suffered as a result of the negligence. Not all class members got the same thing because there were effectively subcategories in the class. And the question there was: well, really, how much is this degree of suffering worth, how much is that degree of suffering worth. So ultimately it required changes and I concluded it was fair. The treatment wasn't equal because the positions of the class members were different. I suppose people who fell within the same little category shared the same settlement.[1132]

b. Other, Non-Traditional Fairness Factors

In the course of the interviews, I asked the judges to describe their fairness evaluation process, and notably discuss the factors that they rely upon, and the relative importance of each of the traditional factors of the fairness

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[1132] Interview No. 8.

lists applicable in each of the jurisdictions. In their answers, the judges shared some of the other factors that they consider relevant to the settlement fairness determination. I will discuss these factors below.

One first fairness factor discussed with the judges that does not appear on the traditional lists of factors of the relevant jurisdictions is the behaviour modification and deterrence factor. As appears from Table XVI, below, I found that the great majority of the judges interviewed (8/14) and asked about that factor considered that it was an important factor of fairness. The Ontario judges appeared more sceptical regarding this factor's importance specifically at the settlement approval stage. The Quebec judges were overwhelmingly in favour of considering it at all stages, including settlement approval.

Table XVI: Importance of Behaviour Modification Factor in the Evaluation of Settlement Fairness:

Behavior Mod. & Fairness	**≥5 (5 or more)**	**<5 (less than 5**
2009-J-CL-BC-1	X	
2009-J-CL-BC-2	X	
2009-J-CL-BC-3		X
2009-J-CL-BC-6	X	
2009-J-CL-O-1		X
2009-J-CL-O-2		X
2009-J-CL-O-3		X
2009-J-CL-O-4		X
2009-J-CC-QC-1	X	
2009-J-CC-QC-2	X	
2009-J-CC-QC-3	X	
2009-J-CC-QC-4	X	
2009-J-CC-QC-5	X	
2010-J-CL-US-1		X
TOTAL :	8	6

At the outset, my first, general impression from the interviews was that the common law judges generally consider the deterrence and behaviour modification factor, but that they do so very abstractly and/or theoretically. Accordingly, I am not sure that they have truly experienced it or seen results that indicate that behaviour modification or deterrence truly exist (this may well be true for all judges, as deterrence is really hard to prove). Indeed, most of their responses were qualified responses, and contained caveats or additional explanations which evidenced that they either felt uncomfortable applying this factor, had a poor understanding of the concept, were unsure of its applications, or generally did not believe that factor to be important in practice.

One of the Ontario judges I interviewed explained how the interest of the public probably came into consideration in one of his cases (while not specifically at the occasion of a settlement approval), but that he did not feel that the factor was being regularly observed or applied in his jurisdiction:

> […] there was a trace, more than a trace of: we're not gonna let them get away with this. And the result was in one of them that something like 80 percent of the fee went to charity. It didn't go to the class members at all. So *that's sort of the public interest, I think*. We're often told that certification is unfair to defendants. I think the system does stack the cards against the defendants. In our system in Ontario, it's too easy to get certification and the pressures on defendants to settle

> are horrendous. So *I think in theory, fairness to defendants should be a consideration, but I suspect it's one that's more on the bridge than the observance*.[1133] [italics added]

Another judge mentioned that he would consider deterrence and behaviour modification at certification, but not at the settlement approval stage: "As I say, at the certification, I think [the interest of the public and behaviour modification factor is] important. At the settlement, I don't think it's that important."[1134]

In British Columbia, three of the four judges asked about behaviour modification and deterrence viewed these factors as important to the ultimate settlement fairness determination. Interestingly, my impression was that they valued these factors for theoretical reasons, specifically because they are one of the three recognized class action objectives. One British Columbia judge welcomed my implicit suggestion that deterrence be considered as a factor of settlement fairness, but appeared not to have considered it before:

> Well, *I would hope I'd have those in the back of my mind. It's interesting. I mean, that's obviously probably a paramount consideration. I mean, after all, these are class actions; they have a certain purpose, they have certain goals*. The resolution of these claims is for a number of different reasons to be able to allow people to litigate claims they

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[1133] Interview No. 9.

[1134] Interview No. 10.

> couldn't otherwise litigate. And that's often the driving factor in why people settle these cases, right?[1135] [italics added]

One of his colleagues similarly recognized that the class action objectives must be respected in the settlement context:

> I think that the public has an expectation that the goals of the class action legislation are going to be fostered, so that if we're settling, then it has to be for something more than just paying lawyers. So why are we settling. *The class action legislation has the goals of, amongst other things, changing behaviour. So is this going to lead to one of those goals?* So, yeah, the public consideration is definitely there in my mind, as well as the sort of immediate public response where So and So settles for 10 million dollars, 9.5 of it goes to lawyers. I think the public is not gonna be happy with that picture. So *I look at it: does this meet the goals, the public goals of the Act? How is the public going to perceive that's being achieved? Yeah, I do think about that.* Not that I would say, "don't settle just because the public is gonna get up in arms about it", but there are goals larger than

[1135] Interview No. 17.

> the parties in the class action legislation, so, yeah, I do think about those.[…] there's a purpose behind the Act, so of course you want to foster the Act.[1136] [italics added]

Interestly, another of their colleagues cautioned that deterrence and behaviour modification are important, but perhaps not equally in all types of cases:

> [T]here may be some cases where the public interest will be absolutely crucial and there may be other cases where the public interest is almost non existent, at least certainly non existent in reference to the class. In banking, where there are overdraft charges by credit unions contrary to the Criminal Code, the public interest is almost not existent. […] I guess if it were my bank or my credit union, it would matter to me. The credit union that set these fees existed for years and years and somebody did a calculation one day and said, "ah! you can't charge five dollars for that, that's a breach of the Criminal Code", or whatever. But the

[1136] Interview No. 12.

> public interest in that case is pretty minimal.[1137] [italics added]

The Quebec judges I interviewed place social justice factors such as access to justice and behaviour modification high on the list of settlement fairness factors. One judge was particularly adamant about the need to make defendants pay for their mistakes, and faults:

> Q: Behaviour modification is difficult to evaluate.
>
> R. Yes
>
> Q: But what is certain is that when one pays, one is punished.
>
> R. Money should be coming out of the defendant's pockets. […] Independent of the claims process […][1138]

Another Quebec judge interestingly explained that behaviour modification is an important factor, particularly in certain cases where the sums requested by class members are smaller: "in many cases, the deterrence objective is more important, will have a more important role. In cases where the damages are nominal, deterrence is an important factor because everybody knows that not many people will come claim their 3$ or 4$ available […][1139] This judge was probably then referring to the access to justice objective, rather than deterrence.

[1137] Interview No. 15.

[1138] Interview No. 5.

[1139] Interview No. 4.

Finally, the United States federal court judge I interviewed did not appear to consider this particular class action objective or of any other such objective, at the settlement approval stage. He explained:

> In Canada you are far more optimistic about that role than we have become in the United States over the years. I think over the years, there's been a certain amount of scepticism or cynicism that has settled in, because of the entrepreneurialism and the huge amounts that go into lawyers' pockets, and the fear that the certification of a class may drive a settlement even if the merits don't, simply because the amounts are so huge that the defendants can't afford to risk litigating it to trial and resolved. *The deterrence factor, as you folks describe it is much less promoted, I think, in the United States than for you folks*.[1140] [italics added]

In the course of the interviews, I attempted to evaluate whether the judges consider the defendant's interests as an indicator of settlement fairness. Precisely, I asked whether they might consider, in their evaluation of settlement fairness, the fact that the defendant was forced/not forced to settle. I found this factor not to be highly regarded in their fairness evaluation. In fact, each of the twelve (12) judges asked about that factor indicated that it was not a relevant factor for them. Certain judges also

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[1140] Interview No. 1.

answered that they did not understand what situation that expression referred to, or that they had never had a case with a "weak" defendant that needed to be protected. The following two extracts are representative samples of the exchanges I had with judges on that question:

> Q: The fact that the defendant was not forced to settle.
>
> R: Usually you wouldn't even know whether the defendant was forced to settle. Nobody could force the defendant to settle, in the sense of putting a gun to their head![1141]
>
> Q: The fact that the defendant was not forced to settle, or was forced to settle.
>
> R: How could that be important to me. The fact that the defendant was forced to settle. […]
>
> R: I'm not sure how it could operate. I'm not sure that it ever has operated. How could it? Are you saying would it influence the size of the settlement, or the fact of the settlement?
>
> Q: Well, would it influence the decision to approve or disapprove the proposed settlement.

[1141] Interview No. 11.

R: How could it?[1142]

Only one of the judges interviewed suggested that one may consider the defendant's perspective. The statement is rather weak and inconclusive:

> […] you only look at the interests of the defendant when you focus on the objectives of class proceedings generally, I mean to resolve these disputes, […] I'm sure that *I would contemplate resolving cases reasonably from everyone's perspective*. Usually, the defendants in these cases that I've seen, that's not been the consideration, […][1143] [italics added]

Another judge interestingly indicated in passing that it was not "politically correct" to discuss the defendants' interests, but that he had seen cases where the defendants were indeed forced to settle for financial reasons. For him, the class action remains a "redoubtable and formidable tool."[1144]

Turning now to other, non-traditional factors of fairness, several of the judges interviewed mentioned, as an important indicator of settlement fairness, the information relative to negotiations and communications with class members prior to the settlement's conclusion. For these judges, it is important to know what happened at the negotiations stage, what concessions were made by each side, what communication were held with

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[1142] Interview No. 9.

[1143] Interview No. 17.

[1144] Interview No. 6.

actual and potential class members, and how involved these members were with negotiation of the deal. As one judge aptly explained:

> I'm told as a part of the settlement negotiation approval process, that there were settlement negotiations and sometimes I actually gain some insight to the extent of the settlement negotiations because the settlement approval may come with the fee approval process, so you have some understanding of the number of hours that were engaged with respect to some things. But by the process, I meant not that I particularly have details of it, but rather I know that there is a process in which the plaintiffs, theoretically and in most cases practically speaking, wish to get as much money as they can and the defendants wish to pay as little as they can. And so, *one can anticipate genuine hard bargaining in the circumstances. So it's that process that emerges and they will spend some time leading up to this and as part of the settlement material, talking about the case. So you do have a sense of the case and the likelihood of liability.* Then it depends upon the nature of the case. […] And of course it also depends on the point in time when the

> parties entered into settlement negotiations. If they entered into settlement negotiations prediscovery, they will have less information about the damage qualifications than they would if they had entered into it after a full discovery. It also depends on the nature of how the certification hearing went, because if the certification hearing had a major focus on liability issues, which it's not supposed to have but sometimes does for a variety of reasons, then you'll have a better reading on what the potential is. […].[1145] [italics added]

Another judge similarly underscored the need to better understand the settlement negotiations: "I question the parties more and more about the measures of communication with class members, what communications were made with them regarding the case, how many people were interested […]"[1146]

The Quebec judges I interviewed seemed to give a lot of importance to adequately compensating the class members in an efficient manner. Indeed, one Quebec judge emphasised the need to be efficient, and related that need to the objective of compensation, explaining that there is:

[1145] Interview No. 10.

[1146] Interview No. 4.

> this sort of balance that we must keep as judges between our beautiful justice with a capital "J", the one we learn about in law school, and the need for efficiency on the judicial process. […] At some point, […] there must be results. […] *There's something to be said about being a little more efficient and maybe a little less dogmatic*. […] Sometimes you have people objecting to the deal but you look at it from a whole, and you think 'there are 10 000 people waiting to be compensated. […]
>
> *There is a difference between between justice with a capital "J" and efficient justice. I believe that we should have efficient justice because then everyone is content at a certain level. What worries me sometimes is that there may be members who get compensated less. But these are individuals that may not have sued in the first place, so they do still get compensated. I believe that people should get compensated*.[1147] [italics added]

[1147] Interview No. 6.

Conclusion on Settlement Fairness Factors

Evaluating both the relative importance of the traditional list of settlement fairness factors and the relevance of other factors has been tremendously instructive. It has served to illustrate that the great majority of the traditional fairness factors appear important and significant to the judges interviewed. Only the data regarding adequacy of notice and the timing of negotiation of counsel fees and the amount of those fees remain inconclusive. On the other hand, the reaction of the class/presence and number of objections is a factor that does not generally appear to influence the judges interviewed, and that these judges do not generally believe to be determinative in their evaluation of settlement fairness. On the other hand, my analysis of the non-traditional factors has shown an interest, stronger among the Quebec judges interviewed, for the factors of deterrence and behaviour modification, and among all judges, for the extent of the settlement negotiations and sufficient communication with class members about the projected settlement.

I conclude from this analysis that aside from the reaction of the class factor, the traditional fairness factors appear to be useful and important to the judges interviewed. I also have learnt that the non-traditional fairness factors mentioned in the above paragraph are important for the judges in their fairness determination, in ways that will be further discussed in my general conclusion. However, and as will be, again, further discussed below, one question remains, given the judges' tendency to grade most of the factors with a "7" and above: are the lists of factors truly useful to the judges interviewed?

The importance of the factors still does vary from case to case, and reciting the factors may well end up being a meaningless exercise, as explained by these two judges below:

> [Y]ou can't get carried away with these factors and you do need to look at the particular circumstances of every case in order to find out what is fair and reasonable. But they will come forward in every case. In every case, you get this boiler plate. They will justify the settlement on the basis of those criteria, and it's unfortunate.[1148]

> […] what the court is doing for the class as a whole is not something that judges lack experience in in dealing with more limited cases where they're dealing with their own clients, but it's quite a unique experience to try to get all those factors in your mind. […] So when you talk about the factors you take into account, I think essentially that judges want to be satisfied that lawyers have gone at it hard in the best interest of their client and this is what's come out of that crucible, and if that's what happened, you know what the cases say, they say the judges should be

[1148] Interview No. 10.

> quite influenced by that and I think that's by and large correct. And when judges have concerns that that maybe is not as complete a process as it might have been, then more weight has to be put on their own assessment of the overall circumstances.[1149]

Accordingly, and as I will further discuss in the thesis' conclusion, the determination of fairness should focus, instead, on a more general, two-parted substantive and procedural inquiry, as aptly summarized by this B.C. judge:

> […] it's simply a matter of applying the law and the law is reasonably clear that by and large the obligation of the judge is to ensure that the settlement is one that's fair and in the best interest of the class members as a whole. […] *it's a matter of process, it's a matter of substance and whether, weighing all the factors, it's in the best interest to accept that settlement, or go on and continue the fight*.[1150]

[1149] Interview No. 17.

[1150] Interview No. 17.

CONCLUSION: THREE HATS, THREE MAJOR REFORM RECOMMENDATIONS; OR THE ROAD TO FAIR PROCESSES AND JUST OUTCOMES IN CLASS ACTION SETTLEMENTS

In this thesis, I have worn three hats: the jurist's hat, the sociologist (or sociological jurist)'s hat and the law reformer's hat. I wore the first hat in my first three theoretical chapters respectively discussing the processes of settlement approval (Chapter I), the roles of the principal settlement actors (Chapter II) and the standard of settlement fairness (Chapter III). When I suggested hypotheses for reform at the end of each of these three chapters, I removed my jurist hat. I sought credibility and grounding for final reform proposals through a sociological approach; precisely, I spoke to the principal "real-life" actors concerned with class action settlement approvals: the judges. I then substituted my first hat for another, sociologist (or sociological jurist)'s hat, in my description of the data from the qualitative interviews of the judges (Chapter IV).

In this conclusion, I wear the law reformer's hat and propose three major reform recommendations that address, once again, the process, the actors and the fairness standard. Before discussing these recommendations, however, I find it important to retrospect upon my chosen theoretical approach and method. Was this approach useful, appropriate? Was the interview method effective to support reform in this area of class action law?

My two-parted methodological approach, consisting of a critical analysis of the positive law relative to class settlement approvals, and of qualitative interviews of judges, was useful and appropriate to support law reform principles. In the first, theoretical part of the thesis, I was able to outline and discuss the currently applicable laws, the policy behind their most peculiar provisions, and the relevant caselaw in each of the four

jurisdictions. In the second, empirical part of the thesis, involving the seventeen interviews of judges, I was able to uncover the policy behind the laws and statutes, and the reasoning behind the caselaw. I was also able to discuss with the judges the lacunas in the statutes, the areas of legislative priority, the practical difficulties experienced in the task of class action settlement review and approval. Of course, the empirical approach had limitations, which are discussed in Chapter IV, but yet was extremely useful, relevant and effective to supporting, further developing and/or perfecting my final solutions for reform.

Finally, I ask, in this conclusion: were my initial hypotheses for reform, found in Chapters I-III, plausible, in light of the empirical data and judicial practices? Do they lead to useful, workable and relevant recommendations for reform?

The answer is neither entirely positive, nor entirely negative. Each of the reform hypotheses I initially suggested is generally plausible and relevant, but each does not lead to useful or workable solutions for reform, such that my final recommendations are distinct from my initial ones.

There are three principal reasons for which I modified my initial reform hypotheses: costs, practicality and practicability.

Costs. One of the underlying purposes of my reform recommendations is to strengthen the protection of the interests of the absentee class through adequate safeguards and representation. This purpose, however, must be achieved without making class settlements impossible to effect. Critics will say that settlements need to be a less costly and more efficient alternative than trial. As is further explained below in my three final recommendations, I modified some of my initial reform hypotheses to

keep costs low and to accordingly permit settlements to remain a viable and enticing alternative to trial.

I will admit that many of my proposals for reform will require a greater human effort and involvement on the part of the judges in evaluating fairness and ensuring that the interests of the members are safeguarded; accordingly, more time and energy will generally be required to evaluate settlement fairness. Indeed, the adequacy of representation standard, notably, is made more exacting by the reforms proposed. The processes also become more structured, in such a way as to require the settlement actors to be candid, transparent, vigilant and diligent.

Granted, my reforms may involve incidental additional costs on the settlement parties, but these costs are proportional to the ultimate benefits of settlement, are required to more closely protect class members, and ultimately will ensure fairer and more efficient settlement outcomes. In addition, what my reforms fundamentally require is not an increase in costs; instead, they involve a profound change in the attitudes of the class action settlement actors. The judge becomes more active and inquisitorial, the lawyers and representatives are more closely involved with the ascertainement of absent members' interests; all of them are more candid, transparent. Hence, the increase in costs, if any, is minimal, and is well worth the additional safeguards and protections of the class members' rights.

In any event, I am tempted to ask: must settlement necessarily be less costly than trial? Defendants chose to settle because it gives them the certainty of peace, and control over the outcome and costs of litigation. Plaintiffs also settle for these reasons, but also because it gives them the guarantee of recovering at least something. Accordingly, costs are not the

only reason why parties choose to settle, and a small increase in costs to achieve fairer class settlements will not discourage the parties to settle. In the end, the great advantage of class settlements is that their approval leads to "public acceptance of privately negotiated solutions to difficult social problems".[1151]

Practicality and practicability. To achieve fairness of process and outcome in the collective settlement context, the procedure must be practical and practicable. *Practical*, because the procedure is useful or suitable in practice, and *practicable* because the procedure is capable of being implemented or used. After having interviewed the judges, it appeared to me that several of my initial reform hypotheses were either impractical or impracticable. I further outline below some of my preliminary concerns regarding the practicability and practicality of the three final recommendations for reform.

In these recommendations for reform, I followed my same initial objectives, as stated in the Introduction:

1. Informing judges, counsel and the parties (including absent class members);
2. Promoting transparency in the judicial practices;
3. Clarifying and simplifying the fairness standard and relevant fairness criteria, roles of the actors and settlement processes;
4. Bringing consistency in the standard and criteria used to evaluate settlement fairness, as well as

[1151] Menkel-Meadow, "Ethics", *supra* note 13 at 1213.

certainty and predictability of process and outcome in class action settlements;

5. Respecting the principal class action law objectives; and

6. Encouraging more involvement by class members, by giving these members a voice and more control over the outcome, consistently with traditional, unitary litigation.

I also respected the same initial four class action settlement governance principles, summarized as follows:

1. Adequacy of representation;

2. Complete disclosure and transparency;

3. Inquisitorial justice; and

4. Respect for class action law objectives.

Therefore, my three recommendations for reform are organised following the thesis' three principal seams: (1) the settlement processes; (2) the principal settlement actors; and (3) the settlement fairness standard. Importantly, these recommendations are *not* founded upon the opinions of the judges as expressed in the course of the interviews. Instead, they are mine, and are founded upon my preliminary reform hypotheses, which hypotheses have been balanced off the practices and needs of the judges in the four target jurisdictions.

Where has the road to fair processes and outcomes in class action settlements led me…? Right here. To the following three, largely-framed, recommendations:

Recommendation No. 1: An Informed, Transparent and Economical Process of Settlement Evaluation and Approval

This first recommendation for reform may be summarized in three words: informed, transparent and economical. The process should be informed and seek to inform, first, requiring candour on the part of the parties and lawyers (further described in Recommendation No. 2), requiring that the members be fully and properly informed of the settlement's substance, process of approval and hearings, and requiring that the judges be informed as clearly as possible about the essence of the compromise and each of the parties' respective compensation, independent from the settlement negotiations. Second, the process should be transparent such as to allow the parties and lawyers, but the public as well, to understand the settlement, the approval process, the reasons for approval and the ultimate judgment supporting it. Third, the process should be economical, in permitting multiple occasions to discuss the settlement's fairness (but only one at which to evaluate it), using the most recent and appropriate technological means of diffusion and notice, keeping in mind the need to preserve the best and highest possibilities for compensation to class action members – hence, keeping in mind that the notice must be economical.

Judges evaluate settlement fairness at different stages. While at least one hearing must be held, some judges require multiple occasions to evaluate fairness, and others do not. I have noted, in the course of the interviews, that the practices vary in that respect in the target jurisdictions, especially between Ontario and U.S. judges, on the one hand, and Quebec and B.C. judges, on the other. While the former group appeared more structured regarding the two-staged fairness determination, and the objectives of these hearings, holding both a preliminary hearing, to gain a solid understanding of the proposed agreement, and a final fairness hearing,

the latter group appeared much less structured. The objectives of the hearing essentially focus on understanding the agreement and evaluating fairness.

One principal issue that arises here is exactly when must settlement fairness be evaluated, and in which forum? Is settlement fairness necessarily evaluable at two distinct stages? Furthermore, is it appropriate for judges to become so involved in the development of evidence that it becomes difficult not to approve proposed settlements at the final fairness hearing? How and when must settlement fairness be proven?

In my initial hypotheses for reform, I made recommendations relating to the negotiations stage, the settlement evaluation stage, and the settlement administration and implementation stages. In the course of the interviews, I did not discuss the negotiations stage specifically, other than when addressing the relative importance of settlement negotiations as an indicator of fairness. What was unmistakable in the interviews conducted was that for most of the judges interviewed, the settlement negotiations are considered as an indicator of settlement fairness. Accordingly, the evaluation of fairness depends on the negotiations stage, a stage at which judges are usually not involved, and the details of which mostly remain a mystery to these judges.

In fact, while most judges indicated that they feel uncomfortable properly participating in the negotiations stage of the agreement through discussion and suggested amendments, several of them also indicated that they had participated in post-settlement-conclusion-negotiations (after the joint submission for approval is made), a participation in the form of discussion, debate, and suggested amendments. The judges considered

this stage to be a pre-approval conference, or a preliminary "fairness hearing".

I suggested in my hypotheses for reform that there should be another judge involved at the pre-approval, settlement negotiations stage, in complex class action cases.[1152] This suggestion would involve two distinct judges: one settlement "negotiator" judge (negotiations judge), and one settlement "evaluator" judge (settlement judge). The negotiations judge would participate in the negotiations, suggest amendments to the document, hear some of the arguments for and against the settlement, and generally conduct the first real assessment of the settlement's fairness and reasonableness. He would then sign an affidavit affirming these settlement characteristics and remain available for discussion about these elements of fairness with the settlement judge. This would eliminate – or seriously diminish – the possibilities of bias or conflict of interest by these two judges. The settlement judge would be in charge of the settlement fairness hearing, a final stage at which to evaluate fairness of settlement and the need for approval.

I maintain this initial hypothesis for reform because I believe it achieves my reform objectives and governance principles. Involving another judge in the process of class settlement evaluation and approval, in complex cases, creates a fairer process in which judges are transparent about their practices and are able to share the difficult task of fairness evaluation with another. It is also a process through which the members' interests are more closely identified and respected because judges are made aware of the extent and details of the negotiations. This proposal is also ideal in

[1152] See footnote 246 *supra*.

multi-jurisdictional settlements, which are becoming increasingly more prevalent in the four target jurisdictions.

Involving another judge may seem impractical and impracticable, given the existing difficulties with court administration and clogged caseloads in the four jurisdictions. But my view is that, first, this proposal would not clog the system, but would instead help complex class actions be resolved faster because the process would be simpler and judges would have more confidence in the outcomes generated. Second, the reality is that judges are already involved in class action settlement negotiations in one form or another in my key jurisdictions. In Quebec, judges conduct CRAs, in Ontario and British Columbia, settlements are mediated, and in the U.S. district courts, mediators get involved with settlements, and sign affidavits to the settlement judge affirming the proposed settlement's fairness and reasonableness.

Information and transparency cannot be achieved if representation is inadequate. Hence, adequacy of representation is another, in my view, fundamental consideration in the class action settlement approval process. The judges interviewed consistently supported the plausibility of my recommendation that greater responsibility, care and adequate representation be assured by class counsel. They were concerned that representation by counsel is frequently inadequate and that they are too often awarded extravagant fees compared to the ultimate compensation received by class members. Thus, a recommendation that fees be negotiated separately from the settlement's provisions is also plausible. In addition, the duty of candour was mentioned by many judges, in such a way as to support a recommendation that lawyers be candid and honest with the members, other lawyers and judges when negotiating and presenting class settlements for approval.

At the settlement evaluation stage, I recommended that specialized judges be placed in charge of handling class action settlements approvals. My experience interviewing judges has revealed that the majority of the judges interviewed had at least some experience with class action settlements. But even the ones who had little experience – only one settlement approval, for example – had excellent reflexes and excellent reasoning in ways that challenged my initial proposal of specialized judges. Nonetheless, I maintain this recommendation for specialized judges because I believe that greater experience brings greater confidence, expertise, and more extensive involvement in settlement appreciation and approvals. Fairer outcomes ensue.

I also suggested that a formal public hearing continue to be mandatory, and that the approval process be two-staged, with one formal fairness hearing, and another preliminary hearing in the form of a more economical teleconference or videoconference. This preliminary hearing aims to begin the settlement fairness approval process and engage in preliminary discussions regarding the settlement's fairness. At this stage, the judge reviews the agreement and annexes, discusses its provisions and more problematic areas, in view of preparing the document for approval, at the fairness hearing. I suggested that the judge already act inquisitorially at that stage such as to be involved with the parties, question the settlement, and find solutions. I also suggested that the duty of candour should begin to apply at that stage, in a way that full disclosure is made, notably regarding the amount of compensation to class members, the remedy and the cost of compensation.

The interviews conducted revealed interesting, diverse opinions of the judges about the ideal time and place of the fairness determination. The contemporary practice of judges appears to be that the most common and

preferred way of evaluating settlement fairness is on separate occasions. The judges appear to begin their decision-making process at the very moment they initially receive the settlement papers. At that stage, they form a first opinion about the settlement's fairness. They will read the documents, raise issues about certain provisions, have questions for the parties and counsel. They will generally require answers to these questions at the occasion of a settlement conference, or at a later stage. They may raise red flags or problematic areas which need to be re-worked and will be, such that a new document is later issued.

Accordingly, the practice of the judges reveals that separate occasions to address the fairness of settlement are necessary. But does my preliminary hypothesis stand? Is it practical and practicable to have two hearings, one preliminary, and one formal and final?

One preliminary issue must be addressed. The majority of the judges interviewed indicated that they had never refused to approve a proposed settlement. Several also mentioned how difficult it was, after having become involved with the parties at the pre-approval stage, to deny a proposed settlement that they, at least implicitly, have helped structure and bring to life. This raises serious concerns about the process of approval and the validity of the judges' involvement. If approvals are automatic, judges should not need to be involved. Hence, these judges must feel more comfortable rejecting proposed deals. And, if approvals are automatic, why have two hearings?

I wondered, in the course of the interviews, about the final fairness hearing's true value, use and purpose. For some judges, the final hearing confirms a prior decision to approve, made during preliminary meetings or conferences. For others, it is the formal occasion to hear the evidence

and confirm an understanding of the deal, before approving it. If there are going to be more than one occasion at which to evaluate settlement fairness, each must have a stated purpose. At present, what my interviews revealed are similar purposes to the two hearings.

Costs, practicality and practicability support a process in which the fairness of simpler cases is generally evaluated at one occasion only: the fairness hearing. The final fairness hearing is the true decision-making stage, the stage at which solid evidence is presented regarding the settlement's monetary value, foundation and justification, and at which counsel plead and class representatives are heard. By contrast, in more complex cases[1153], the evaluation of fairness should be made at more than one occasion, and involve more than one judge: one negotiations judge and one settlement judge. The pre-approval negotiations, if any, should be supervised by the negotiations judge by way of more economical telephone conferences or videoconferences.

The interviews support the plausibility of these propositions. The judges interviewed will generally hold one formal fairness hearing to determine settlement fairness with all finality. They will hear counsel argue in favour of the settlement's fairness and reasonableness, and will on occasion hear the representative, objectors and/or expert witnesses. Experts are generally perceived as necessary participants in more obscure cases such as antitrust or complex securities or commercial cases.

Interestingly, counsel's arguments are considered to be crucially important to the judges. These judges worry nonetheless that the oral representations are repeated *verbatim* in the written brief, and that the settling parties and counsel unanimously agree that the settlement should

[1153] According to my definition of "complex case", elaborated *supra* in footnote 246.

be approved, while there is no adverseness. I myself worry that so much confidence is given by the judges to the representations made by counsel without enough questioning.

My proposal of a systematic examination of the class representatives attempts to palliate this difficulty. The representative would be required to explain why he or she supports the agreement, and why the settlement outcome is fair to the class as a whole. Through this testimony, the judges would evaluate the representative's understanding of the case, of the agreement, and of his or her own interests in it. I firmly maintain this recommendation, which helps tighten the standard of adequacy of representation by the representative, among other objectives.

I also suggested that expert testimonies be made more frequent in cases where red flags are raised and are difficult to solve, or in complex specialised cases, especially to add weight to the fairness hearing process. I believe that these testimonies should in fact be exceptional, as they increase costs tremendously. In complex cases, if settlement judges and negotiations judges work together, they will be able to understand the settlement's provisions and evaluate its fairness. There may then be a limited need for experts.

In my hypotheses for reform were recommendations regarding settlement notices. I suggested that they be required to inform of the settlement hearing, and that no judge ever hear the parties and counsel before sufficient notice is given, and sufficient time has passed between the time of issuance and the date of the hearing. The interviews conducted highlighted the need for such notices, as the judges require them in their practices. Although there was no formal, planned discussion of the notices during the interviews, what transpired was a great concern with the

improperly informed class representatives and class members, as well as the lack of objectors (in part due to the absence or inadequacy of the notices).

These remarks regarding the notices entirely support the plausibility of my preliminary recommendation for automatic, strictly enforced settlement notices aimed at informing the largest number of individual class members about the nature of the lawsuit, the gist of the proposed settlement, the amount of compensation envisaged, and the date, place and time of the hearing and details of the rights to object and opt-out. Two words should qualify the notices: simple and clear. Again, this recommendation is consistent with my governance principles, of complete disclosure and transparency, on the one hand, and of access to justice in terms of giving the parties all chances to participate fully to the hearing, and comment or oppose the proposed settlement.

The recommendation is also practical and practicable, but only if the qualitative *simple* is wholly respected. A simple notice should be a very short notice that anyone can read[1154], standing in approximately five (5) paragraphs. It should be sent through technological means, to keep costs to a minimum. The judges should review the notice through the eye of the reasonable member and ask: will this member read and understand it, and know how to claim the compensation provided therein?

What about the role of the objectors, if any? I suggested, in my hypotheses for reform, that objections be welcomed and duly considered when filed, especially for the red flags that they may raise. In the end, as mentioned by one of the judges interviewed, the objectors are the only ones *against* the settlement, and that opinion counts. Their opinion, in fact, gives

[1154] Notices should be crafted keeping in mind the illiteracy rates in North America.

comfort to the settlement judges, who feel that at least one argument was made against the proposed deal. What the interviews have demonstrated is that objections are sometimes perceived negatively by these judges, and viewed as a challenge to the settlement's final conclusion and approval.

I believe that the objections will become of higher quality with greater information and transparency being afforded to class members and the public, and consistently proven adequate representation by the representative. Reform should thus include clear settlement notices written in plain language, sent through the most wide-reaching vehicles. It should also reinforce the role of the representative in reaching out to class members, informing them of the action and settlement, listening to the concerns of class members, encouraging and supporting objectors if any.

In support of the plausibility of this proposal, I replicate the inspiring words of one of the judges interviewed, when asked about his recommendations for reform:

> The first element of reform: the structuring of an information system, that is essential for me. Better communication with the class members. Second, if we have better communication with the members, I would want to have a better interaction between the representative and the members as a whole, in the context of settlement.[1155]

[1155] Interview No. 4.

In my hypotheses for reform, I further suggested that court monitors be involved in the settlement approval process. The great majority of the judges interviewed showed welcoming attitudes regarding third party opinions of fairness of the kind provided by court monitors. This attitude is attributable in part to the absence of adversaries at the hearing and in part to the informational disadvantage of the judges. Having a third person opine about the settlement's fairness is viewed as an advantage for these judges. My interviews of the judges and post-interview musings have led me to believe that the court monitors are not necessary to the settlement fairness determination process. The idea of the monitor is welcomed by the judges because they view these individuals as helpers, as friends of the court who will be there to discuss the settlement, to break the isolation. My suggestion of having another judge, a negotiations judge, involved at the pre-approval stage would achieve this objective with the guarantees of judicial ethics. Moreover, additional information and transparency would work in favour of helping judges decide the fairness of proposed settlements.

Regarding the settlement implementation and administration stages, I further initially suggested that the settlement judge remain involved in the settlement's administration and implementation, and that he or she oversee the execution of the settlement and distribution of benefits. I recommended that periodic reports be required, that claims administrators or special masters be appointed, with specific duties, and that one last settlement fairness hearing be held at the conclusion of the distribution process. The plausibility of these hypotheses is only partly supported by the interviews conducted.

My interviews revealed that the contemporary practice of the judges is to refrain from active involvement beyond the settlement's approval. Judges

generally appear to believe that involvement in the settlement's administration and implementation should be left to claims administrators. They generally appear to prefer to be left out of the process completely. They do, on the other hand, agree that requesting end-of-administration reports would be a solid improvement to the current law.

Accordingly, while the judges' opinions do not all support the plausibility of this reform proposal, I believe that the law should require judges to remain involved in administrative issues, when required and in conformity with the judgement on approval, and that a final report automatically be required from the lawyers explaining how the monies have been distributed (detailing the "take-up" rate), how much time was required to distribute, and why the distribution was made fairly and reasonably for all members of the class. This final reporting is critical as it places an additional burden on the lawyers to properly and fairly implement the negotiated and approved settlement, even after approval was given, and the judgment rendered. It also allows judges to verify that the members have indeed been compensated. Meanwhile, it does implicate additional costs, but these costs would be minimal in my view and worth the additional safeguards and protections of class members' interests.

Finally, detailed reasons for judgment, relying on procedural and substantive fairness determinations – instead of fairness lists – should be given, such as to achieve the objectives of transparency and consistency of the practices, as indicated in my hypotheses for reform.

Recommendation No. 2: Candid, Honest and Adequate Representatives, Informed Members, and Inquisitorial and Active Judges

This second proposal is, once again, consistent with my governance principles of adequate representation by the representatives, inquisitorial justice, transparent and informed practices, and respect of the class action law objectives.

The judges interviewed generally described the class action settlement context as one in which the lawyers file a class action, broach the idea of settlement, negotiate an agreement, then properly conclude it, with the class action representative and class action members having very little to do with the process or outcome. They agree that the absent class action members' interests should be protected, but disagree about who should have the official role of protection. Some say it should be the representatives, others say it should be class counsel; most recognize that they too have a role to play in that regard. The judges self-describe their practices and processes of approval as ones in which they act as overseers of the settlement's conclusion, generally agreeing to give the final seal of approval to a document that they will have challenged very little.

The majority of the judges interviewed were very critical of the role of the class action representative. The Quebec judges expressed the desire to see that role enforced and scrutinized more closely, especially at the settlement stage. Inconsistencies about the role of class counsel toward the representative and the absent class members were revealed in the testimonies of the judges. Most of the judges interviewed explained that they rely tremendously on class counsel's representations of fairness, but they also appeared uncertain about the extent of class counsel's responsibilities toward class members at the settlement approval stage.

Ultimately, for some, asking questions is the best way to protect the members; for others, it is the objectors who protect the members in highlighting the settlement's problematic provisions. Finally, Quebec judges and the U.S. federal judge particularly emphasised defence counsel's need to fulfil their duty of candour.

I recommended, in my hypotheses for reform, that the standard of adequate representation by class representatives be more closely scrutinized in the specific class action settlement context. Indeed, settlements are concluded after negotiations are held and the lawyers discuss the interests of the persons principally interested by it: the class action members. The class representative appears to be poorly involved during the settlement negotiations or at the settlement approval stage, in ways that challenge the adequacy of representation requirement. The judges interviewed were preoccupied by this situation, wondering "how can the members' interests then properly be protected?"

Accordingly, my suggestion that the law require stricter standards of protection and adequate representation is plausible. The representative represents all class members both before and after certification. Before a proposed settlement is approved, the adequacy of representation by the representative should be, once again, verified, and closely scrutinized. Questions should be asked, notably regarding the negotiations, the representative's involvement during these negotiations, the extent of his or her communications with the class members and class counsel, his or her understanding of the agreement and the extent to which he or she is satisfied with its provisions. In fact, the law should provide that the judge will ask the representative to testify at the hearing, such as to verify his or her knowledge and understanding of the proposed settlement.

The judges interviewed generally agreed that they principally rely on the representations made by counsel regarding the proposed settlement to decide whether the settlement is fair. Accordingly, the process of settlement appreciation that they describe is one extensively driven by the lawyers. At the risk of oversimplifying the process described, the lawyers will conclude the deal, will explain it to the judge and will generally see it approved. That tendency, in itself, is problematic. Another problematic aspect of the interviews was the inconsistency about the identity of class counsel's primary client(s), specifically before certification. Thus, clarifying the practice and rules in that regard is important.

I suggested, in my hypotheses for reform, that the law provide that lawyers have a duty and responsibility, along with the representative, to ensure the fairness of proposed settlements. I proposed that before certification, class counsel be made to have an attorney-client relationship with the class representative *only*, and a duty to closely monitor the relationship between the representative and the members during settlement negotiations and at later stages of the action, until the formal approval of the settlement. I also suggested that after certification, class counsel have an attorney-client relationship with the class representative and the other members of the class.

Representing class members is a difficult task, given the unusually large size of the class, but this representation should be achieved by contacting, in conjunction with the representative, several of the "key" absent class members[1156], to discuss the settlement and ensure that a *sufficient* understanding is reached about its main provisions, and that the interests of a *significant* proportion of these members are adequately provided for

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[1156] See *supra* footnote 375 for definition of "key" class member.

in the settlement. Sure, the qualitatives "sufficient" and "significant" are vague, especially in a reform context. But what they essentially require is that the judge be reassured that the representatives have contacted key members, explained the class action, settlement and compensation plan and scheme, and that a significant number of members will understand enough of it to be able to object, opt-out or claim compensation.

The interviews conducted do not entirely support the plausibility of these initial hypotheses. The judges interviewed showed serious concern for the adequate representation of the class members, and for the potential conflicts and abuses created through their representation by counsel. Although they did not extensively comment the duties of class counsel or their relationship with the members, what they appeared to require – and be concerned about – is adequate representation of the class members at all stages of the action, including settlement. In fact, these judges seek out – and would like to have, ultimately – better assurances of this adequate representation. This representation is important to them because it gives them greater confidence in their decision to approve proposed settlements based on fairness, and reassurance that someone else has looked after the rights of the class members.

Therefore, my hypothesis that, before certification, the law require that class members be represented only by the class representatives and not by class counsel is problematic. It is problematic because, in many cases such as the settlement class, for instance, where the case develops very quickly and the settlement is concluded at the very beginning of the litigation, the class members' representation will likely be insufficient and inadequate. The class representative will not likely know enough about the case or the members to adequately represent them. Furthermore, the situation will be such that it will be much more difficult to evaluate of the likelihood of

success on the merit, and that counsel's assistance will be required. In these kinds of instances, it would be more plausible to require separate representation of the class members by distinct counsel.[1157] Otherwise, my initial hypothesis concerning the relationship between counsel, the representative and the members is plausible and is maintained. It requires, however, that class representatives closely represent the interests of the members and be more than "figureheads".

The interviews otherwise evidenced a contemporary judicial practice of extensive reliance on the lawyers' representations of fairness. This practice is questionable, without additional assurances of fairness or an adversary context. The interviewees suggested that when judges know that counsel arguing at the hearing have a good reputation, they tend to believe what is argued and tend to automatically approve the proposed settlement.

How may judges be given greater assurances of the fairness of proposed settlements and of the adequacy of representation? The more plausible solution is that they first seek the signed declaration of the negotiations judge, in "complex cases", regarding the fairness of settlement, and second, solicit testimonies from the representative and/or other class members about the settlement's fairness to the class as a whole. Objections should also be encouraged, welcomed, and thoroughly considered. In simpler cases, by contrast, adequacy of representation would be less problematic and judges would more easily conclude to the proposed settlement's fairness.

Another area of concern for the judges is the tremendous risks of conflict and possibilities of abuse by class counsel, which may be partly reduced

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[1157] Only one of the judges interviewed argued that separate representation of the members should be required: Interview No. 11.

by ensuring that the fees are negotiated at a separate time from the settlement's negotiation, and that they are paid once at least part of the distribution and compensation is completed. Indeed, there should be a motivation for the lawyers to stay involved at the second stage of the settlement: its implementation. Thus, half the fees should be paid at the time of settlement approval and the other half once the administration and distribution is completed.

As for the role and responsibilities of the settlement judge, the interviews conducted revealed how uneasy – or dissatisfied – the judges are regarding the settlement approval process. The great majority of the judges interviewed feel that their role is unclear, inappropriate, or unsuited to the task, process and context of approval. They dislike, for the great majority, having to evaluate and approve proposed settlements. How can the process and outcome of class action settlements be made fair when judges are so adamantly dissatisfied with their role and involvement?

I attempted to uncover the underlying reasons for this negative reaction. Several judges explained how lonely they feel, given the absence of an adversary opposing the proposed settlement. Others described how distressing the informational disadvantage with the lawyers was, and how uncomfortable they felt requesting additional information or evidence. Many felt that they did not have the right tools or training to complete the task. Others, yet again, explained that they felt that they should not become involved with disapprovals or denials, and that they should instead tend to respect the proposed settlements as voluntary contracts entered into by and between the parties. My impression, as stated above, was that the judges tend to approve proposed settlements for three different reasons: 1) the psychological dynamic, in which no one is

adversary and challenging the document feels unnatural and uncomfortable; 2) the informational disadvantage; 3) the belief that settlements are contracts and should be respected and approved as such.

This tendency to approve proposed settlements is made even more problematic with the increasingly higher percentages of multi-jurisdictional cases, witnessed in Quebec (but also presumably affecting the rest of Canada). If judges tend to approve settlements, they also tend to approve national settlements that have a larger reach and seek to compensate even larger classes or subclasses. This leads me to suggest that judges be even more cautious in approvals of multi-jurisdictional settlements, that they be more sensible to differences in the applicable laws, and in the interests of class members located in distinct jurisdictions. They should also be concerned that their judgment about fairness for the class as a whole be untinted and uninfluenced by previous conclusions of settlement fairness in other jurisdictions. Finally, notice issues should be carefully considered, such that in addition to the principles of clarity and simplicity, members located in each and every jurisdiction are duly informed of the existence of the settlement and of its substance.

In the thesis, I sought to explore the attitudes of the judges interviewed toward proposed settlements. I asked myself whether the judges had attitudes which tended to aggressively question proposed settlements, or to question them only when they saw red flags indicating unfairness, or not to question them at all. I found that the majority of the judges interviewed question settlements only when they see red flags or indicators of unfairness.

When asked how they define or perceive their role at the settlement approval stage, several of the interviewees gave contradictory answers,

while others half-answered the question by explaining that their role is complex and multi-faceted. Most of the judges generally referred to the applicable law of their target jurisdiction, using the words attributable to the role of the settlement judge as defined in their caselaw, without developing further, and without situating their own contribution within this description or categorization. My impression from the interviews was that the judges interviewed would welcome additional guidelines about their role, detailing how this role might modify their judicial practices.

I interpreted the judge's interview transcripts as allowing a three-parted categorization of the attitudes of settlement judges: the negotiator, the conciliator and the traditional adjudicator. I found that the great majority of the judges interviewed tend to act as typical adjudicators and be adversarial at the settlement approval stage, in line with their traditional role, and that the Quebec judges interviewed appeared to be less adversarial than their colleagues. I also sought to determine whether the judges viewed themselves as protectors of the class members. I evaluated that a minority of the judges interviewed disagree with the concept of protection, but that most of these judges consider themselves as protectors, but either admit to not knowing how to act as protectors, or the interview indicates that they clearly do not act as such or do not know what the expression "protector of absent class members" refers to. Evidently, I thought, if the concept of protection exists, it must be made more explicit to the judges such that they better understand their responsibilities toward class members.

Interestingly, I noted differences in the terminology used by the judges to define and characterize their role and responsibility toward class

members.[1158] Certain judges referred to a role of "protector", others to a role of "fiduciary", and others to a role of "ombudsperson" or "ombudsman". The interviews suggested that the roles of ombudsman and fiduciary have a slightly stronger impact and reach than the role of protector. Indeed, the interviews of the self-described "protectors" left me with a strong impression that they felt less responsible toward class members than the self-proclaimed "ombudsmen" and "fiduciary" judges.

During the course of the interviews, and at the data analysis stage, I wondered what proportion of the judges interviewed really act inquisitorially at the settlement evaluation and approval stage. It is one thing to say that you judge inquisitorially or that you should judge inquisitorially, but quite another to personnaly direct the settlement's evaluation of fairness, to choose the required evidence, to examine the witnesses, and to ask questions. I found, after reviewing the transcripts a few times, that although most of the judges interviewed believe that they should act inquisitorially, they tend not to do so in practice.

Only three of the judges interviewed (two from Quebec) tended to have at least some of the characteristics and attitudes of inquisitorial judges at the settlement approval stage. A few others appeared to believe that acting inquisitorially would be a good thing, but the way they described their practices demonstrated that they do not act as such in practice. Others yet again appeared uncomfortable acting inquisitorially, or would prefer if someone else acted inquisitorially for them. Finally, other judges believe that the fact of asking questions equals to judging inquisitorially. I did not

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[1158]See e.g. on the choice of class action language: Gérald Tremblay, Q.C., Shaun Finn, and Claire Ezzedin, "Speaking the Class Action, Thinking the Class Action: A Discussion of the Changing Trends in Quebec's Class Action Lexicon" (2010) 6:1 Can. Class Action Rev. 157.

consider in my analysis that the fact of merely asking questions was sufficient to act inquisitorially; I required more direction and inquisition at the settlement fairness hearing and at the prior evaluation stage to characterize the judges as inquisitorial.

What can thus be done to make the role of the settlement judge better-fitted, such that judges enjoy the task and do not feel obliged to approve the proposed compromise in the absence of a better or alternative argument or solution? Are my initial recommendations for reform plausible in this context?

In my hypotheses for reform, I suggested that the rules and practice provide that the judge be 1) active and involved, 2) a protector of not just the interests of absent class members, but also of the representatives, defendants and public, and 3) inquisitorial and conciliatory. I explained that the context of settlement approval requires the settlement judge to actively engage in ascertaining the substantive and procedural fairness requirements of the proposed settlement. I also recommended that an enlarged duty of protection be preferred, that the judge both protect class members through the monitoring of adequate representation, and recognize, ascertain and protect the interests of the other class action settlement actors. I argued that judges should be concerned with the public's perceptions and interests in the class action settlement. I recommended that the settlement judge be preoccupied with the search for the "truth" about the settlement, and that to do so, he become closely involved in defining the legal and factual issues, and verifying that they are addressed adequately in the settlement agreement. Finally, I argued that the role of the settlement judge should be distinguished from his case managing role, but that he should still be conciliatory, creative and flexible in finding solutions regarding the proposed settlement.

In the end, when tested for plausibility against the qualitative data from the interviews, I do not believe that my initial three-parted recommendation for reform should stand entirely. The role of the judge at settlement approval is multi-faceted because it involves different tasks being done at three different stages: 1) the pre-approval stage; 2) the fairness hearing and approval stage; 3) the post-approval stage. Accordingly, instead of having one single role generally applicable to all stages of the settlement approval, more specificity is required.

I indicated, in my preliminary hypotheses, that the role of the judge should be uniform at all stages of the class litigation, for more predictability and certainty. Having now spoken to the "real-life" settlement approval actors, I now believe that there are subtleties in the tasks required from the judges at each and every stage of the class action settlement approval that require my reform proposals to be more specific. Precisely, the role of the settlement judge should be made adequate to each task to be practical and practicable.

At the pre-approval stage, the interviews have demonstrated that when the judge is seized of a proposed settlement and asked to approve it, he may, or may not, decide to become involved with the settlement details in the way of suggesting changes to the proposed document. Hence, he may or may not become involved, *per se*, in discussing or "negotiating" certain of the agreement's provisions with the parties. If the judge chooses to become involved at that stage, in complex cases, he should refer the case to a negotiator judge. The latter judge will preside over a settlement mediation and negotiation, keeping in mind the settlement's later approval. At this pre-approval stage, the negotiations judge should be active, inquisitorial, and conciliatory in the way of working toward approval of the settlement. At the pre-approval stage of simpler cases,

judges will not generally become involved in negotiation discussions regarding proposed settlements.

I indicated above that the interviews revealed tremendous difficulties with the process of approval, as well as feelings of loneliness and a perception by some of the judges of an incapacity to properly evaluate settlements. Several prominent American authors have opined that class action settlement judges are unsuited to properly evaluate and scrutinize proposed settlements. In the words of Columbia Law School Professor John Coffee, "[a]lthough many reforms are possible and could succeed, only one is sure to fail: reliance on trial court scrutiny of the settlement."[1159] New York University School of Law Professor Samuel Issacharoff similarly stated that "[n]o matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members."[1160]

I disagree with these authors. The interviews I conducted have allowed me to understand – and confirm a prior personal belief – that the settlement judge is well able to fulfill his role, scrutinize the proposed settlement and protect the interests of absent class members. The judges I interviewed all have professional backgrounds which have led them to experience bargaining and compromising. Most have developed the required experience over the years in evaluating class action settlements, such that they are able to evaluate the fairness of proposed settlements. They are in fact well-equipped to aptly complete the task of evaluation

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[1159] Coffee, "Class Action Accountability", *supra* note 218 at 438.

[1160] Issacharoff, "Class Action Conflicts", *supra* note 243 at 829.

and approval. The lack of resources noted by Issacharoff, if any, does not and should not stop these judges from carefully assessing proposed settlements. In fact, the judges should work with the other class settlement actors in obtaining the relevant information and supporting their fairness decisions.

Nonetheless, what is missing for them to succeed in doing so, in my view, is a better-structured process, more guidelines for the judicial evaluation of fairness, a different approach to judicial approval, and the presence of either an adversary, to challenge the proposed settlement, or a friend (or colleague), to bounce off settlement fairness ideas and opinions. The adversary will ideally be an objector; a serious, competent, well-prepared and good-intentioned objector. The friend or colleague could well be the negotiator judge, involved in pre-approval settlement discussions and negotiations.

The judges I interviewed want a more "satisfying" approach to class action settlement approval, and one that involves from the pre-approval stage, caucus (or transmission of information), truth, honesty and disclosure.[1161] At the fairness hearing or approval stage, the judge is no longer a negotiator or a conciliator. His principal task is understanding the substantive provisions of the compromise, and ascertaining the adequacy of representation by the class members' fiduciaries. The most plausible recommendation for reform, at that stage, is to require the judge to be a protector of not just the interests of absent class members, but also of the representatives, of the defendants and of the public.

At that stage, judges should of course be primarily protecting absent class action members, but not in the sense of attempting to imagine what their

[1161] See e.g. Interview No. 12.

presumed best interests might be. The judges do not know what these interests are and have no way of actually finding them out. Settlement judges should monitor adequate representation and ensure that the members are protected by their fiduciaries, the class representatives and class counsel. As aptly explained by one of the judges interviewed, the task of judges is to "measure whether or not the class has been protected":

> I don't see myself as taking on the role of the class' protector. *I simply measure whether or not the class has been protected, which I think is different*.
>
> […] I've had a lawyer recently say to me, the other day, that I have a job to protect the class. I said to him, "*I don't have a job to protect the class; I have a job to see that a test is met*".[1162] [italics added]

In addition, I suggested that when red flags are raised suggesting collusion or improper reasons for settlement, the protection of the defendant's interest should, this time, justify the exercise of increased judicial scrutiny. This suggestion is plausible. Indeed, fair settlements benefit plaintiffs, defendants and society at large. Fairness will lead to the greater trust and confidence in the justice system. The public's interest in a fair settlement should, accordingly, also be considered, notably through the respect of the class action objectives of deterrence and behavior modification.

The settlement judge should only approve proposed settlements that were supported by enough evidence of fairness and reasonableness to class

[1162] Interview No. 10.

members, as per the standard of fairness described below in my third recommendation. Accordingly, when the reviewing judge does not have enough information about the proposed compromise, he or she should request it, and make the additional information a condition to approval. In fact, the settlement judge should act inquisitorially throughout all stages of the settlement review and approval process.

At the post-approval stage, if and when the settlement judge remains involved, he or she should act both in an inquisitorial fashion and in a conciliatory fashion. This judge should stay available and informed about the settlement's implementation, actively and creatively adjudicating the related claims and acting inquisitorially when reviewing status updates and mandatory final reports of administration. He or she should be particularly concerned with the take-up rates, at this point, such that the greatest numbers of class members actually claim their compensation.

Finally, I have explained in Chapter IV that most of the judges interviewed perceive fairness as being directly related to the outcome of the litigation, to the monetary compensation received. This approach and philosophy are problematic, given the role of protection of the settlement judge, which includes a responsibility to ensure that the member is well-represented.

Even if not entirely consistent with the judges' stated priorities, the most plausible approach is to require that judges respect the other civil justice and class action objectives, which must be at the core of all fairness determinations. Judges should be concerned with the access to justice, behavioural modification and efficiency objectives of the class action, which are indicators of the fairness of a proposed compromise.

Recommendation No. 3: A Fair Settlement is a Substantively and Procedurally Fair Deal Reached by Adequate Representatives, Consistently with Class Action Objectives

This third and last recommendation for reform conforms with three of my preferred class settlement governance principles enunciated in the Introduction: adequacy of representation, complete disclosure and transparency, and the utmost respect for the class action law objectives.

I began this project seeking to explore an assumption on my part that the settlement fairness standard was inadequate or ill-suited to achieve fairness of process and outcome in class action settlements. When I asked the judges interviewed whether they agreed with this assumption, most of them answered that they did not. I nonetheless felt, in their responses, a certain discomfort with the process followed to review and approve class settlements and with the role of the settlement judge. Directly related and relevant to these two discomforts – and inadequacies! – is the standard of settlement fairness, a highly subjective concept that is difficult to define.

A reformed standard will better support my proposed reforms regarding the approval processes and the roles of the settlement actors. This standard is generally based upon my initial reform hypotheses, which I find plausible in light of the interviews conducted, for the reasons expressed below.

As such, the interviews revealed that most of the judges believe that costs and efficiency are the primary factors relevant to a conclusion of settlement fairness and to an approval decision. They also reveal that each of the judges interviewed approach settlement fairness in very distinct ways. In my Table XII, I noted that the preferred approach to evaluation of settlement fairness is to rely on representation to presume fairness (8/17

judges), or alternatively, evaluate fairness primarily based on the relevant lists of fairness factors (6/17 judges). Only a few of the other judges interviewed (3/17 judges), from Quebec principally, will evaluate fairness according to the reasonable member (asking, "is this fair according to the reasonable member?"). Therefore, this table indicates that the judges interviewed give adequacy of representation tremendous importance at the settlement fairness evaluation stage. For the majority of them, adequate representation guarantees fair settlements.

Moreover, the interviews conducted revealed that the judges generally prefer settlement over trial, and tend to presume that proposed deals are fair. Only a few of the judges interviewed categorically stood against presumptions of settlement fairness. The majority of them explained that they will first presume the settlement to be fair, then will scrutinize it according to the lists of factors, excluding each and every possibility of unfairness to finally conclude, how they really wanted to originally, by approving the deal as presented.

In the discussion of the traditional settlement fairness factors from the relevant lists of each of the jurisdictions at stake, I explained that the judges interviewed regard the likelihood of success on the merits weighed against the form and amount of settlement relief, the expense of trial, the recommendation of counsel and the adequacy of representation (and discovery evidence sufficient to support that determination of adequacy) as primarily important and relevant indicators of settlement fairness. The judges interviewed want to understand the deal, and be certain that the members would not have otherwise obtained a better deal at trial. They rely tremendously on what counsel will have argued and recommended, and essentially presume that the settlement will be fair when they see enough evidence that the representation of the members was adequate.

Other factors were harder to evaluate, or their evaluation inconclusive, such as the good faith and absence of collusion factor, which is, in theory, important to the judges interviewed, but does not, in practice, appear to be determinative.

Other factors were evaluated by the judges interviewed as being less important and/or relevant to the fairness determination: the adequacy of notice factor and the reaction of the class (presence and number of objections) factor. I interpret the latter responses as being due to the very few objections to settlement fairness raised in practice in my target jurisdictions. As for the notice issue, it appeared nonetheless important to the judges interviewed because it was mentioned at other moments during the course of the interviews.

As for the non-traditional factors, the judges by and large indicated a concern for behaviour modification and deterrence objectives, but it was not an element of fairness that they voluntarily brought up as being significant or relevant. I instead suggested that they tell me whether they valued these factors in their fairness determination, and they then responded positively for the majority. Several of the judges also indicated that they felt that the nature and extent of the settlement negotiations were strong indicia of settlement fairness.

I conclude from this analysis of the data found that aside from the reaction of the class and notice of settlement factors, the traditional fairness factors appear to be useful and important to the judges interviewed. However, given the judges' tendency to grade most of the factors with a "7" and above, would it not be more plausible and useful to leave aside the lists of factors and codify general tests of substantive and procedural fairness? I have felt, in the course of the interviews, that the relative importance of

the factors varies from case to case, and that the lists of factors are recited somewhat meaninglessly to often support a previous determination of settlement fairness based on intuition.

Accordingly, as suggested in my prior hypotheses for reform, it would be more plausible for the law to provide that instead of relying on standardized lists of settlement fairness factors, judges should balance larger-framed procedural and substantive fairness inquiries. The settlement fairness factors that are perceived as more important to the judges would then be used as indicia of substantive and procedural fairness, but not as absolute prerequisites to a fairness determination.

I suggested, in my initial hypotheses for reform, that the judges support their evaluation of settlement fairness with the following list of questions derived from the *ALI Principles, 2010*:

1. Have the class representative and class counsel been adequately representing the class?

2. Is the relief afforded to the class fair and reasonable given the costs, risks, probability of success and delays of trial and appeal?

3. Have class members been treated equitably?

4. Has the settlement been negotiated at arm's length and is it truly non-collusive?[1163]

My interviews, however, have revealed that while judges view the first two factors as critically important to the settlement fairness determination, the third and fourth factors are considered as somewhat less important to

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[1163] See *supra* footnote 728.

this determination. The judges interviewed rarely found the class members to have been treated inequitably. Moreover, since they so highly regard the opinion and work of counsel, they do not appear to consider arm's length negotiations and the absence of collusion as determinative of fairness. They consider these latter elements as automatisms, thinking "of course the negotiations will have been appropriately conducted by counsel, how could they not?"

The first factor of adequacy of representation is, nonetheless, crucially important to these judges. The second factor is also tremendously important, because it involves the understanding of the agreement itself. Of course, when judges consider the costs, risks, duration and likely result of trial, as the alternative of settlement, they are in effect considering the conditions to an unlikely outcome of contemporary civil litigation. This exercise of comparison is artificial and outdated. Settlement judges should instead consider the settlement compensation offered to class members, and evaluate it considering alternative, comparable settlements, in similar class action cases.

Notwithstanding this, the factor involves a perfectly appropriate and relevant analysis of the deal's provisions and of the compensation provided to the members, which must stand in the evaluation of settlement fairness. The judge must ask: how much is provided to the members? How easy will it be for them to claim compensation?

Accordingly, to summarize, the most plausible approach is to require that proposed class action settlements should be approved when considered fair substantively and procedurally, relying principally on the evaluation of adequate representation of the class members, on the evaluation and understanding of the compromise, and on a conclusion that it fairly

compensates the class as compared to similar class action settlements. Fairness or adequacy of representation should never be presumed. Adequacy of representation should be considered from the class's standpoint, and any objection hinting to inferior representation should be interpreted as a red flag.

In my hypotheses for reform, I suggested in my Table I that settlement fairness be evaluated from three different perspectives and at two distinct moments of the settlement process, in a way similar to the evaluation of the fairness of corporate arrangements. I indicated that fairness should be evaluated from the first perspective of the class as a whole, of course, but also, from a second perspective, the public's, given the need to prioritize the public interest objectives of class action settlements. As such, the fair settlement will allow access to justice when it compensates a large group of individuals who would not otherwise have filed a class action and been compensated. It will often – though not always – deter future negative behaviour when the defendants pay a high dollar amount. It will be economical and efficient if negotiated and approved in a reasonable time frame, in ways that the members are compensated quickly, and using proportionate procedures to achieve approval of proposed settlements.

The third perspective was that fairness should be evaluated according to the reasonable member, on a more individual scale. I explained that this evaluation cannot involve a consideration of each of the individual members' interests, but must, instead, presume that the reasonable class member of each subclass will be satisfied by the deal. The judge should ask: "how easy and feasible will it be for this member to claim compensation?" Settlement fairness should thus be evaluated both *ex ante* and *ex post* of the settlement's conclusion. Finally, I suggested that a fair class settlement accord with and promote the underlying objectives of

class action law, respect the proportionality principle, and exclude abuses by the settlement actors.

Although the interviews did not exactly support my original reform hypotheses, they suggested that they were plausible and could stand as presented in Table I. Critics will want to argue that my proposals are too costly, and are impractical and impracticable. I instead believe that they are neither impractical nor impracticable, and that they will involve minimally important additional costs, as discussed above, in Chapter III notably.

Because my proposals involve a change in method and approach, and a more complete and complex scrutinization of settlement fairness, from different standpoints, they will necessitate that the settlement actors spend more time and energy to make settlements effective. They will also require a greater effort on the part of the settlement judges, in line, nonetheless, with the contemporary practice of these judges, principally to avoid arbitrary approvals. Hence, my approach will necessitate more involvement and a change in culture and attitudes, but this change is proportional to the general evolution of civil justice and the contemporary role of its actors.

A fair settlement should, accordingly, be one which (1) is considered procedurally and substantively fair, without automatic references to the existing lists of settlement fairness factors, and without presumptions of fairness, (2) accords with and promotes the objectives of class action law, is proportional considering its objectives and costs, and is not the result of abusive manoeuvres, and (3) is evaluated at two different moments of the settlement's conclusion and according to three different perspectives, as evidenced in my Table I.

Looking at the Future

This thesis' primary objective was to reform the rules and judicial practices regarding class action settlement approvals in North America. I suggested hypotheses for reform, which I later tested for their plausibility against qualitative data found from seventeen interviews of judges in four target jurisdictions. With my three hats, the jurist's hat, the sociologist (or sociological jurist)'s hat and the law reformer's hat, I concluded that most – but not all – of my original reform hypotheses were plausible, could, and in fact *should* be maintained.

Several aspects of this thesis could still be explored further. For example, in the near future I plan to examine the requirement of adequacy of representation from the lawyer's perspective at the settlement stage. I plan on meeting with lawyers and class representatives to explore their relationship. I will seek to determine exactly what information lawyers give class representatives about projected settlements, how often they meet or communicate with these representatives, what kinds of contact they have with class members. I will also seek to understand how involved the class representatives truly are during the negotiations stage, and whether the lawyers are in fact given a mandate of representation by the representatives.

In the end, what have the contemporary practices of the judges revealed regarding the importance of fairness? Judges prefer fairness over justice: "[there is] a compromise. And you could […] differentiate between resolving a dispute and doing justice. So it's a bit deeply philosophical. I

mean, there's a difference between a just settlement and doing justice. […] I'm looking […] for fairness."[1164]

Where does the road to class action settlement fairness and outcome lead us? Can fairness truly exist in compromises reached within the peculiar, polycentric and largely money-driven class action system? Perhaps the solution lies elsewhere, and fairness can only exist in this context with a change in the class action's culture, a more humanistic philosophy of lawyering, and peacemaker adjudication.

[1164] Interview No. 10.

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APPENDICES

APPENDIX I: Sample lists of questions to judges (in French and English);

APPENDIX II: Sample consent forms for the judges (in French and English) (without the signatures of the judges, to preserve confidentiality);

APPENDIX III: List of free nodes and tree nodes codified in the N'Vivo Software;

APPENDIX IV: List of attributes and queries as codified in the N'Vivo Software.